

# THE ANTITRUST LEGACY OF JUSTICE WILLIAM O. DOUGLAS

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## I. INTRODUCTION

One cannot study the history of antitrust law without running headlong into the opinions of Associate Justice William O. Douglas. In his thirty-six years on the Supreme Court, he authored thirty-five majority opinions and nearly as many dissenting or concurring opinions in cases involving antitrust questions or issues. It is quite probable that Justice Douglas authored more antitrust opinions, both for the majority and in dissent, than any Supreme Court justice in history. And since antitrust law is largely case law, it seems axiomatic that Douglas, one of the Court's leading liberals, must have had a significant influence on the development of antitrust law. The question remains, however, whether this influence was positive or negative and, given recent doctrinal changes, lasting.

In teaching the antitrust course for thirty years, I have annually been surprised by the unevenness of the Douglas antitrust opinions. One, *United States v. Socony-*

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*Vacuum Oil Co.*,<sup>1</sup> has stood the test of time and become a bedrock of antitrust law. Many more, however, are quite dated and, dare I suggest, result-oriented.<sup>2</sup> Certainly Justice Douglas is thought of as one of the leading antitrust hawks of the Warren Court era, when the government or private plaintiff seemingly always prevailed.<sup>3</sup> Antitrust law has evolved and changed dramatically over the thirty-three years since Douglas finally and most reluctantly retired from the Supreme Court. One can almost imagine the good justice's upset as more and more of his opinions are discarded or simply ignored by the present day Court.

Justice Douglas' antitrust philosophy can be easily characterized. He firmly believed that "big is bad" and that the Sherman Act was designed to make illegal significant concentrations of economic power, no matter how attained. As a result, he has been characterized as an economic conservative in apparent contrast to his political liberalism.<sup>4</sup> He believed in the expansive power of the federal government to regulate the economy<sup>5</sup> and thought that the Sherman and Clayton Acts gave effect to that authority. There is also significant evidence that Douglas believed that a principal aim of antitrust was to protect the viability of small businesses, even at the expense of the consumer.<sup>6</sup> Those ideals have arguably all been discarded by contemporary antitrust policy.

Justice Douglas did have a lasting impact on antitrust law, however. He understood the havoc that competitor collaboration could wreak on a competitive

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<sup>1</sup>United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

<sup>2</sup>Others have come to the same conclusion looking at Justice Douglas' opinions in other areas of the law. See, e.g., G. Edward White, *The Anti-Judge: William O. Douglas and the Ambiguities of Individuality*, 74 VA. L. REV. 17, 46 (1988) ("The doctrinal dimensions of judging, for Douglas, were relatively insignificant; what counted were the results in cases and the political philosophies that those results signified."). See also Melvin I. Urofsky, *William O. Douglas as a Common Law Judge*, 41 DUKE L.J. 133, 134 (1991); Robert J. McKeever, *The Fall and Rise of Judicial Activism in the United States: The Case of Justice William O. Douglas*, 11 J. OF LEGAL HIST. 437, 442-45 (1990).

<sup>3</sup>See, e.g., United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966) (Stewart, J., dissenting) ("The sole consistency that I can find is that in litigation under [Section] 7, the [g]overnment always wins."). See also United States v. Grinnell Corp., 384 U.S. 563, 585 (1966) (Fortas, J., dissenting).

<sup>4</sup>See Alden Whitman, *William O. Douglas is Dead at 81: Served 36 Years on Supreme Court*, N.Y. TIMES, Jan. 20, 1980, at 1, 28.

<sup>5</sup>This was in stark contrast to his "virtually uncompromising stand in behalf of protection for civil liberties against usurpations by federal and state governments . . ." G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* 246 (1976).

<sup>6</sup>See, e.g., *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 320-21 (1949) (Douglas, J., dissenting) ("[W]e can expect that the oil companies will move in to supplant [independent stations] with their own stations. There will still be competition between the oil companies. But there will be a tragic loss to the nation. The small, independent business man will be supplanted by clerks.").

economy, even if he did sometimes take that notion too far.<sup>7</sup> He was a staunch advocate of the so-called “price mechanism,” believing that the free and open market should determine output and price. He authored the seminal opinion on the issue<sup>8</sup> shortly after taking his seat on the Supreme Court and never wavered from the idea that any collective interference with the setting of price was illegal.

With this background, this Article will attempt to further define and refine Justice Douglas’ antitrust philosophy by examining his written opinions and writings. It will then attempt to measure that philosophy’s effect on the Supreme Court during his tenure and its contemporary impact in the context of the rapidly shifting antitrust doctrine of the last thirty years or so.

## II. BIOGRAPHICAL SKETCH

William O. Douglas was appointed to the Supreme Court from the chairmanship of the Securities Exchange Commission in 1939 by President Franklin Delano Roosevelt. He was, at forty years of age, the second youngest person ever appointed to our highest court.<sup>9</sup> He would become the longest serving justice upon his retirement in 1975.

Raised in very humble circumstances in Yakima, Washington, he lost his father at the age of six. He then contracted polio before working his way through Whitman College in nearby Walla Walla by holding three jobs so he could send money home. He headed east for law school at Columbia virtually penniless where, after working his way through law school, he claimed, to his chagrin, to have graduated *only* number two in his class.<sup>10</sup> He was bitterly disappointed when Supreme Court Justice Harlan F. Stone, who each year selected a Columbia law graduate as his law clerk, picked the person who had finished first in the class, Al McCormack.<sup>11</sup>

While in law school he worked as a research assistant for Professor Underhill Moore who had been commissioned to write a treatise by the trade association for the cement industries, one of many trade associations under antitrust attack by the

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<sup>7</sup>See, e.g., *United States v. Container Corp. of Am.*, 393 U.S. 333, 338 n.4 (1969). See also *United States v. W.T. Grant Co.*, 345 U.S. 629, 636 (1953) (Douglas, J., dissenting).

<sup>8</sup>*Socony-Vacuum*, 310 U.S. at 150.

<sup>9</sup>See JAMES F. SIMON, *INDEPENDENT JOURNEY – THE LIFE OF WILLIAM O. DOUGLAS* 191 (1980). Only Joseph Story, who was thirty-two when he joined the Court in 1811, was younger. *Id.*

<sup>10</sup>WILLIAM O. DOUGLAS, *GO EAST, YOUNG MAN: THE EARLY YEARS* 148 (1974). Recent biographer Bruce Allen Murphy disputes Justice Douglas’ claim about his class rank, noting that Douglas was not named a James Kent scholar after his first or second years of law school and was not selected to the *Columbia Law Review* staff until the middle of his second year. He also managed to make a grade of “C” in his third-year Constitutional Law class. See BRUCE ALLEN MURPHY, *WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS* 49-51 (2003).

<sup>11</sup>DOUGLAS, *supra* note 10, at 149.

Justice Department. The work involved legal and economic research and analysis as well as travel to interview executives of cement plants in the east.<sup>12</sup>

After graduation, Douglas went to work for the Wall Street firm of Cravath, deGersdorff, Swaine, and Wood and taught Bankruptcy, Damages and Partnership law as an adjunct professor for Columbia, working himself into exhaustion while plagued by stomach problems.<sup>13</sup> He left after two years to return to practice in his hometown of Yakima, but after only a few unhappy months, he returned to New York to a full-time faculty position at Columbia.<sup>14</sup> The Columbia law faculty was the center of the legal realism movement, which was questioning the underlying basis for judicial decision-making. Douglas resigned after only two years there in protest of University President Nicholas Murray Butler's hiring of a law school dean, Young B. Smith, without consulting the law faculty.<sup>15</sup> He was quickly recruited to the Yale law faculty by its boy-wonder dean, Robert Maynard Hutchins. He taught at Yale for six years, eventually declining Hutchins' invitation in 1930 to move to the University of Chicago when Hutchins became president there.<sup>16</sup> To keep him, Yale appointed him to the prestigious Sterling Professorship of Law. He was but thirty-one years old.<sup>17</sup>

At Yale, he formed many friendships, including a close relationship with Thurman Arnold, later to become famous as an aggressive and creative assistant attorney general for the Antitrust Division of the Department of Justice.<sup>18</sup> He

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<sup>12</sup>In his memoirs, Justice Douglas described Moore as having "a cutting edge [mind], sharper than any other. . . . [A] year at his feet was a prodigious experience—in the exactitude with which he dealt with minutiae; in the broad dimensions of the practical world where he framed his questions; in his concern with the roots of the law and their modern incidence." *Id.* at 145.

<sup>13</sup>*Id.* at 150.

<sup>14</sup>*Id.* at 157-58.

<sup>15</sup>Butler was apparently hostile to the legal realism movement and so appointed a dean with a more traditional view of law and legal education. *Id.* at 161. Douglas' two years at Columbia have been described as "among the most famously intense and troubled in the history of American law faculties." William W. Bratton, *Berle and Means Reconsidered at the Century's Turn*, 26 J. CORP. L. 737, 743 (2001).

<sup>16</sup>In his autobiography, Justice Douglas reports that Hutchins characterized him as "the most outstanding law professor" in the country when persuading the University of Chicago Board of Trustees to offer Douglas two and one-half times the then top law school salary of \$10,000. DOUGLAS, *supra* note 10, at 163-64.

<sup>17</sup>*Id.* at 164.

<sup>18</sup>Arnold was from Laramie, Wyoming, and thus he and Douglas "were conspicuous Westerners in an elite eastern institution." SPENCER WEBER WALLER, *THURMOND ARNOLD: A BIOGRAPHY* 48 (2005). The two also shared a "passion for the regulatory side of the law," unlike most of their Yale colleagues whose focus continued to be the courts and the common law. *Id.* On Arnold's impact on the Antitrust Division, see, e.g., SUZANNE WEAVER, *DECISION TO PROSECUTE: ORGANIZATION AND PUBLIC POLICY IN THE ANTITRUST DIVISION* 28-30, 32-36 (1977).

became a recognized expert in corporate law, bankruptcy, and financial institutions and produced or helped produce seven casebooks in those areas<sup>19</sup> as well as a bevy of law review articles.<sup>20</sup> His scholarship “virtually defin[ed] progressive bankruptcy theory in the 1930s.”<sup>21</sup>

Douglas took a one-semester leave in 1934 to conduct a study on bankruptcy reorganizations for the newly created Securities and Exchange Commission, which laid the groundwork for an extensive revision of federal bankruptcy law.<sup>22</sup> Despite stated intentions to the contrary, he would never return to Yale. His rise to national prominence in the New Deal would be meteoric.

At the SEC, Douglas worked for Joseph P. Kennedy, the commission’s first chairman. They were like-minded about a no-nonsense approach to the commission’s enforcement responsibilities and became life-long friends and allies.<sup>23</sup> With Kennedy’s influence, President Roosevelt appointed Douglas as an SEC commissioner in 1936 and then as chairman one year later.<sup>24</sup> During this time, he became a member of President Roosevelt’s inner circle, one of his Sunday night poker companions, and an unofficial economic adviser.

During his tenure as chairman, he took the unprecedented step of taking over the New York Stock Exchange for a time after disclosures that the former exchange president had misappropriated funds. Earlier he had refused the demand of the

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<sup>19</sup>His casebook on the law of financing business institutions contained a substantial section on the law of mergers and acquisitions. See WILLIAM O. DOUGLAS & CARROL M. SHANKS, CASES AND MATERIALS ON THE LAW OF FINANCING OF BUSINESS UNITS 844-47 (1931).

<sup>20</sup>See, e.g., William O. Douglas, *Protective Committees in Railroad Reorganizations*, 47 HARV. L. REV. 565 (1934); William O. Douglas & George E. Bates, *Stock “Brokers” as Agents and Dealers*, 43 YALE L.J. 46 (1933); William O. Douglas & George E. Bates, *The Federal Securities Act of 1933*, 43 YALE L.J. 171 (1933); William O. Douglas & George E. Bates, *Some Effects of the Securities Act Upon Investment Banking*, 1 U. CHI. L. REV. 283 (1933); William O. Douglas, *Some Functional Aspects of Bankruptcy*, 41 YALE L.J. 329 (1932); George E. Bates & William O. Douglas, *Secondary Distribution of Securities—Problems Suggested by Kinney v. Glenny*, 41 YALE L.J. 949 (1932); William O. Douglas & J. Howard Marshall, *A Factual Study of Bankruptcy Administration and Some Suggestions*, 32 COLUM. L. REV. 25 (1932); William O. Douglas & Dorothy S. Thomas, *The Business Failures Project – II. An Analysis of Methods of Investigation*, 40 YALE L.J. 1034 (1931); William Clark, William O. Douglas & Dorothy S. Thomas, *The Business Failures Project – A Problem in Methodology*, 39 YALE L.J. 1013 (1930); William O. Douglas & Carrol M. Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 YALE L.J. 193 (1929); William O. Douglas, *A Functional Approach to the Law of Business Associations*, 23 ILL. L. REV. 673 (1929).

<sup>21</sup>David A. Skeel, Jr., *Vern Countryman and the Path of Progressive (And Populist) Bankruptcy Scholarship*, 113 HARV. L. REV. 1075, 1080 (2000); Bratton, *supra* note 15, at 744.

<sup>22</sup>See Bratton, *supra* note 15, at 744-50.

<sup>23</sup>See SIMON, *supra* note 9, at 140.

<sup>24</sup>See, e.g., MURPHY, *supra* note 10, at 132-33.

exchange to close during a steep sell-off period. He reorganized the SEC to better protect the interests of the investor and is generally thought to have been an excellent administrator.<sup>25</sup>

In early 1939, the Yale Law School selected Douglas as its next dean. He expected to return to New Haven to begin his duties later that year. On February 13, however, Justice Louis Brandeis retired from his seat on the Supreme Court. President Roosevelt had earlier announced that the next Supreme Court vacancy would go to the west coast, which had not had a Supreme Court justice appointed for fourteen years. Secretary of the Interior Harold L. Ickes was a chief advocate for Douglas and, after establishing his bona fides as a westerner, Douglas got the nomination. The Senate confirmed him by a vote of sixty-two to four, with the dissenters asserting that he was a reactionary who was too friendly to Wall Street. It all happened very quickly: Douglas was nominated on March 19, he was confirmed on April 4, and he took his seat on the Court on April 17.<sup>26</sup>

He came close to leaving the Court in 1944 for the Democratic vice-presidential nomination. President Roosevelt dropped incumbent Henry Wallace from his ticket and the choice came down to Harry Truman or Justice Douglas. The convention chose Truman, who ascended to the presidency when President Roosevelt died in 1945. Truman offered Douglas the vice presidency on his ticket in 1948 but Douglas declined because he believed Truman would lose the election.<sup>27</sup> That was his last dalliance with elective office.

He became a leader of the Warren Court uprising in the 1950s and 1960s and due to his long recognized expertise with corporations and business, authored many antitrust opinions during that period. In 1970, House Republican leader Gerald Ford, with the active support of President Richard Nixon, instigated a Judiciary Committee investigation of Douglas' relationship to a couple of left-leaning foundations, with a view toward impeachment. The inquiry was likely a politically motivated act to rid the Court of its leading liberal and give President Nixon another appointment to the Court.<sup>28</sup> The committee inquiry exonerated him and the scheme otherwise backfired because, although Douglas had been seriously considering retirement prior to the investigation, he would stay on the Court five more years.<sup>29</sup>

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<sup>25</sup>See SIMON, *supra* note 9, at 165-89. See also Vern Countryman, *Justice Douglas: Expositor of the Bankruptcy Law*, 16 UCLA L. REV. 773 (1969).

<sup>26</sup>The speed of the confirmation process seems all the more remarkable today when one recalls that the Douglas nomination came only two years after FDR's failed Court-packing plan.

<sup>27</sup>Justice Douglas was widely reported to have said, "I don't want to play second fiddle to a second fiddle." See MURPHY, *supra* note 10, at 254-55.

<sup>28</sup>See SIMON, *supra* note 9, at 406-07; MURPHY, *supra* note 10, at 429-38.

<sup>29</sup>Justice Douglas' private life was controversial with four marriages, with two in his sixties to women in their early twenties. He had an apparently well-known reputation in Washington as a womanizer well into his eighth decade. See MURPHY, *supra* note 10, at 427-29. After his fourth marriage, an Alabama congressman called for a House investigation of his character, but nothing came of it. See Whitman, *supra* note 4, at 28.

Justice Douglas continued to serve on the Court until failing health from a debilitating stroke forced his retirement on November 12, 1975 after thirty-six and a half years on the Court.<sup>30</sup> He died on January 19, 1980 at the age of eighty-one.

### III. DOUGLAS AND LEGAL REALISM

Justice Douglas was a product of the legal realist movement largely emanating from Yale and Columbia in the 1920s and 1930s.<sup>31</sup> Surprisingly, viewed from today when constitutional and social issues dominate the legal landscape, the early realists mostly focused on and impacted private law areas like corporate and commercial law.<sup>32</sup> At least one commentator has argued that by the late 1930s, as legal realists were moving into positions of real executive and judicial influence, antitrust became the principal vehicle for economic and social reform for some, with Douglas chief among the reformers.<sup>33</sup>

Legal realism was in large measure a rejection of the Langdellian approach, which sought to discover fixed, abstract principles from the case law and apply them in an ordered, predictable way to new cases.<sup>34</sup> The Langdellian view prized accurate

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<sup>30</sup>Although physically debilitated by a stroke suffered on New Year's Eve 1974, Justice Douglas insisted that his resignation was a necessary formality but that he had not retired and was still a member, the *tenth* member, of the Supreme Court. He further contended, unsuccessfully, that he was still a voting member of the Court on all cases pending when he resigned, even writing and circulating an opinion in a campaign finance case. See SIMON, *supra* note 9, at 451-54.

<sup>31</sup>See generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 169-92 (1992); LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960* (1986); WILFRED J. RUMBLE, JR., *AMERICAN LEGAL REALISM* (1968). Although Justice Douglas did not specifically refer to himself as a realist in his autobiography, he noted that "[a]t Columbia, revolt against the traditional approach to law was now under way. . . . I joined their ranks." DOUGLAS, *supra* note 10, at 159-60. As early as 1931, Karl Llewellyn, one of the leading realists, identified Douglas as one of the movement's most dedicated proponents. Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1227 (1931).

<sup>32</sup>Leading realists Underhill Moore, Wesley Sturges and Karl Llewellyn were all commercial law scholars. See KALMAN, *supra* note 31, at 20-35; WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 128-40 (1973) (describing Llewellyn's transformation of sales law).

<sup>33</sup>See William H. Page, *Legal Realism and the Shaping of Modern Antitrust*, 44 EMORY L.J. 1, 4, 23-26, 32-34, 38-40 (1995). Thurman Arnold, a Yale law professor who President Roosevelt appointed to head the Antitrust Division of the Justice Department in the spring of 1938, was the legal realist who literally transformed antitrust enforcement. See generally Spencer Weber Waller, *The Antitrust Legacy of Thurman Arnold*, 78 ST. JOHN'S L. REV. 569 (2004); Neil Duxbury, *Some Radicalism about Realism? Thurman Arnold and the Politics of Modern Jurisprudence*, 10 OXFORD J. LEGAL STUD. 11, 34-35 (1990); Douglas Ayer, *In Quest of Efficiency: The Ideological Journey of Thurmond Arnold in the Interwar Period*, 23 STAN. L. REV. 1049 (1971); Corwin D. Edwards, *Thurman Arnold and the Antitrust Laws*, 58 POL. SCI. Q. 338 (1943); Page, *supra*, at 19-23.

<sup>34</sup>See, e.g., Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 11 (1983). The "heart" of realism has been broadly described as "an effort to define and discredit classical

fact-finding and the analytically precise interpretation and application of legal principles.<sup>35</sup> To Justice Douglas, the Langdell "so-called case method" was mere "library law" that "grossly oversimplifies and distorts the nature of law" by ignoring "other psychological, political, economic, business, [and] social factors" that should influence the law and the way legal decisions are made.<sup>36</sup>

Realists tried to close the gap between "law in books" and "law in action."<sup>37</sup> Justice Douglas' principal approach was to endorse "functionalism" while debunking the more traditional "conceptualism" approach to legal reasoning. Functionalism emphasized facts over legal principles. Douglas asserted, for example, that a corporation is "not a thing. It is a method. It defies definition when removed from the background of the purpose attempted to be accomplished and the manner of accomplishing it."<sup>38</sup> He argued that "analysis has been so conceptualized that the attention is too frequently focused on the device used rather than on the function which the device is intended to perform."<sup>39</sup> He believed that a functional approach would increase legal certainty and thus efficiency by focusing on the law's operational effects rather than static rules.<sup>40</sup>

Douglas believed that the functional approach depended on facts, so while an academic he conducted empirical research to collect data about business failures to set the stage for urging reform of the bankruptcy laws.<sup>41</sup> He also applied

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legal theory and practice and to offer in their place a more philosophically and politically enlightened jurisprudence." AMERICAN LEGAL REALISM xiii-xiv (William W. Fisher III, Morton J. Horwitz, & Thomas A. Reed, eds., 1993).

<sup>35</sup>See, e.g., HOWARD BALL & PHILLIP J. COOPER, OF POWER AND RIGHT: HUGO BLACK, WILLIAM O. DOUGLAS AND AMERICA'S CONSTITUTIONAL REVOLUTION 41 (1992).

<sup>36</sup>Jerome Frank, *Democracy and Finance*, 54 HARV. L. REV. 905, 907-08 (1941) (book review) (quoting William O. Douglas, Education for the Law, Address Before the American Association of Collegiate Schools of Business (April, 1936), in DEMOCRACY AND FINANCE 280 (James Allen ed., 1940).

<sup>37</sup>See KALMAN, *supra* note 31, at 9 (quoting Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910)). Pound is generally described as a "nonrealist."

<sup>38</sup>William O. Douglas & Carrol M. Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 YALE L.J. 193, 194 (1929).

<sup>39</sup>William O. Douglas, *A Functional Approach to the Law of Business Associations*, 23 ILL. L. REV. 673, 675 (1929).

<sup>40</sup>*Id.* at 675-76. See also Douglas & Shanks, *supra* note 38, at 210; William O. Douglas & J. Howard Marshall, *A Factual Study of Bankruptcy Administration and Some Suggestions*, 32 COLUM. L. REV. 25 (1932); William O. Douglas, *Wage Earner Bankruptcies—State vs. Federal Control*, 42 YALE L.J. 591 (1933).

<sup>41</sup>See, e.g., William O. Douglas, *Protective Committees in Railroad Reorganizations*, 47 HARV. L. REV. 565 (1934); William O. Douglas, *Some Functional Aspects of Bankruptcy*, 41 YALE L.J. 329 (1932); Douglas & Marshall *supra* note 20; Douglas & Thomas, *supra* note 20; Clark, Douglas & Thomas, *supra* note 20; William O. Douglas & John H. Weir, *Equity Receiverships in the United States District Court for Connecticut: 1920-1929*, 4 CONN. B.J. 1 (1930).



functionalism to his courses and casebooks, focusing on the life cycle common to every business association—beginning with organizing and financing an enterprise, moving to managing it, and concluding with bankruptcy and reorganization.<sup>42</sup> The casebooks required a complete retooling of the corporate law curriculum into a sequence of courses titled losses, management and finance.<sup>43</sup> The academic world, even populated by realists, was not ready for such a radical change. The casebooks found virtually no takers and left little legacy.<sup>44</sup>

The Court Douglas joined in 1939 was controlled by New Dealers, of whom Douglas was one.<sup>45</sup> The New Deal was, of course, populated by legal realists intent on political reform and economic recovery.<sup>46</sup> It fostered the federal government's authority to regulate business as it deemed necessary, but at least early on antitrust and competition were not prominent tools utilized to combat the Depression.<sup>47</sup> In fact, scholars have described the entire history of the New Deal and competition as a study in contradiction.<sup>48</sup> President Franklin Roosevelt himself apparently had doubts

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<sup>42</sup>See WILLIAM O. DOUGLAS & CARROL M. SHANKS, CASES AND MATERIALS ON BUSINESS UNITS—LOSSES, LIABILITIES, AND ASSETS (1932); WILLIAM O. DOUGLAS & CARROL M. SHANKS, CASES AND MATERIALS ON THE LAW OF MANAGEMENT OF BUSINESS UNITS (1931); WILLIAM O. DOUGLAS & CARROL M. SHANKS, CASES AND MATERIALS ON THE LAW OF FINANCING OF BUSINESS UNITS (1931); WILLIAM O. DOUGLAS & CARROL M. SHANKS, CASES AND MATERIALS ON THE LAW OF CORPORATE REORGANIZATION (1931).

<sup>43</sup>See KALMAN, *supra* note 31, at 85-86.

<sup>44</sup>*Id.* at 86-87.

<sup>45</sup>See Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 234-35 (1994).

<sup>46</sup>One leading realist argued that legal realists made New Deal liberalism possible. Jerome Frank, *Realism in Jurisprudence*, 7 AM. L. SCH. REV. 1057, 1063-69 (1934). See also LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 17 (1996); PETER H. IRONS, THE NEW DEAL LAWYERS 6-9 (1982); G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth Century America*, 58 VA. L. REV. 999 (1972); Edward A. Purcell, Jr., *American Jurisprudence Between the Wars: Legal Realism and the Crisis of Democratic Theory*, 75 AM. HIST. REV. 424, 436-37 (1969). Cf. NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 155-58 (1995) (expressing skepticism about the impact of realists in the New Deal).

<sup>47</sup>See, e.g., RUDOLPH J. R. PERITZ, COMPETITION POLICY IN AMERICA, 1888-1992 112 (1996); BERNARD STERNESHER, REXFORD TUGWELL AND THE NEW DEAL 342-43 (1964); ARTHUR M. SCHLESINGER, THE AGE OF ROOSEVELT: THE POLITICS OF UPHEAVAL 272-394 (1960).

<sup>48</sup>The early New Deal emphasized the National Industrial Recovery Act, which was intended to restrict production and raise prices, and the promulgation of industry codes typically sought to control prices, prevent price discounting, legalize open price systems, limit production, and minimize non-price competition. See CHARLES R. GEIST, MONOPOLIES IN AMERICA: EMPIRE BUILDERS AND THEIR ENEMIES FROM JAY GOULD TO BILL GATES 140-43 (2000); ALAN BRINKLEY, THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR 111 (1995); ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE 57-60, 123-24, 136 (1966); WILLIAM E. LEUCHTENBURG,

about the value of unfettered competition.<sup>49</sup> Only with his controversial appointment of Thurman Arnold in 1938 to head the Antitrust Division of the Department of Justice, did the pendulum swing and antitrust begin to be a force to be reckoned with.<sup>50</sup>

Although Justice Douglas is often viewed as perhaps the most activist judge in our history, it would be wrong to assume that the new justice came to the Court with that predisposition. For one thing, judicial activism was precisely what President Roosevelt wished to avoid. His New Deal social legislation had frequently run headlong into the conservative activism of the existing Court, which delighted in striking down his New Deal policies on constitutional grounds. Thus, President Roosevelt chose for his first nominations to the Court men who had promoted and been engaged in New Deal policies.<sup>51</sup>

Further, the evidence suggests that early on Justice Douglas indeed did exercise judicial restraint.<sup>52</sup> That restraint was surprisingly but arguably consistent with his realist predilections. Douglas believed that judging was inescapably subjective. Therefore, restraint was necessary to prevent judges from imposing their own values and wills on democratically elected officials.<sup>53</sup> Otherwise, judges would be intruding on the responsibilities of the executive and legislative branches of government. Of course, judicial restraint is much easier when the judges in fact agree with the social and regulatory agendas of the executive and legislative branches. President Roosevelt selected New Dealers for the Court for expressly that purpose. But as the substance of the Court's docket changed after World War II, "Douglas found the lure of judicial activism irresistible."<sup>54</sup>

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FRANKLIN D. ROOSEVELT AND THE NEW DEAL 1932-1940, 56-60, 64-70, 163-65, 248-49, 258 (1963). There is substantial thinking that the New Deal never really followed or adopted a single, coherent vision but is better remembered as a time of conflict and compromise or what has been described as a "chaos of experimentation." See PERITZ, *supra* note 47, at 329 (quoting RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* (1955)).

<sup>49</sup>See ROBERT H. JACKSON, *THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT* 124 (2003); HAWLEY, *supra* note 48, at 123-24; REXFORD G. TUGWELL, *THE DEMOCRATIC ROOSEVELT* 563 (1957); Wilson D. Miscamble, *Thurman Arnold Goes to Washington: A Look at Antitrust Policy in the Later New Deal*, 56 BUS. HIST. REV. 1, 5 (1982).

<sup>50</sup>See Waller, *supra* note 33; Miscamble, *supra* note 49.

<sup>51</sup>Roosevelt's first four nominations were New Deal Senator Hugo Black (1937), Solicitor-General Stanley Reed (1938), Harvard law professor and presidential adviser Felix Frankfurter (1939) and chairman of the Securities and Exchange Commission William Douglas (1939).

<sup>52</sup>See, e.g., *Davis v. United States*, 328 U.S. 582 (1946) (upholding search without a warrant); *United States v. Classic*, 313 U.S. 299, 336 (1941) (dissenting from majority's application of federal law to state primary election fraud); *McCarroll v. Dixie Greyhound Lines*, 309 U.S. 176, 188-89 (1940) (dissenting from majority's declaring Arkansas state tax of gasoline unconstitutional).

<sup>53</sup>See McKeever, *supra* note 2, at 441 (1990).

<sup>54</sup>See *id.* at 442.

True to his realist's roots, during his long tenure on the Court Justice Douglas adapted and evolved, as the nation also changed dramatically after World War II with the first steps towards integration and then the rampant excesses of McCarthyism.<sup>55</sup> He joined the Court as an expert in corporate finance and bankruptcy and was not, initially, at the frontiers of the First Amendment.<sup>56</sup> He became the most ardent civil libertarian of his time and, the evidence suggests, shifted dramatically in other areas such as tax and perhaps labor law.<sup>57</sup> One of his former law clerks has suggested that Douglas may have changed more while on the Court than any other Supreme Court justice with a lengthy tenure.<sup>58</sup>

In contrast, however, and perhaps not surprisingly given his early academic and government work in bankruptcy and securities, there seems to be less change in those fields.<sup>59</sup> And it would appear from this study that Justice Douglas was predictably consistent in the antitrust field, even though the quality of his opinions was uneven at best.

Justice Douglas' antitrust philosophy was heavily influenced by the man he replaced on the Court, Justice Louis Brandeis. Justices Oliver Wendell Holmes and Brandeis were Douglas' judicial heroes, and Brandeis, Douglas claimed, was his mentor.<sup>60</sup> Douglas himself acknowledged that Brandeis "helped crystallize [my] views" on "the free enterprise system."<sup>61</sup> Brandeis' influential book, *Other People's Money*,<sup>62</sup> became Douglas' economic and political bible.<sup>63</sup> In a 1936 letter written to

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<sup>55</sup>See generally L.A. Powe, Jr., *Justice Douglas After Fifty Years: The First Amendment, McCarthyism and Rights*, 6 CONST. COMMENT. 267 (1989).

<sup>56</sup>See generally L.A. Powe, Jr., *Evolution to Absolutism: Justice Douglas and the First Amendment*, 74 COLUM. L. REV. 371 (1974).

<sup>57</sup>See BERNARD WOLFMAN ET AL., *DISSENT WITHOUT OPINION: THE BEHAVIOR OF JUSTICE WILLIAM O. DOUGLAS IN FEDERAL TAX CASES* (1975) (suggesting a profound shift towards the taxpayer and perhaps in labor law as well).

<sup>58</sup>See Powe, *supra* note 56, at 372, 410.

<sup>59</sup>See John W. Hopkirk, *William O. Douglas—His Work in Policing Bankruptcy Proceedings*, 18 VAND. L. REV. 663, 698 (1965) ("William O. Douglas' major contributions to the field of bankruptcy law are marked by a high degree of continuity in approach and in solutions."); see also Vern Countryman, *Justice Douglas: Expositor of the Bankruptcy Law*, 16 UCLA L. REV. 773 (1969); Richard W. Jennings, *Mr. Justice Douglas: His Influence on Corporate and Securities Regulation*, 73 YALE L.J. 920 (1964).

<sup>60</sup>See MURPHY, *supra* note 10, at 183, 188. But see *id.* at 574 (suggesting that Justice Douglas' claimed relationship with Brandeis before Douglas succeeded him on the Court was overblown or false).

<sup>61</sup>DOUGLAS, *supra* note 10, at 306. See also WILLIAM O. DOUGLAS, *AN ALMANAC OF LIBERTY* 187-89 (1954).

<sup>62</sup>LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY* (1913).

<sup>63</sup>See, e.g., Leon Epstein, *Economic Predilections of Justice Douglas*, 1949 WIS. L. REV. 531, 560 (1949).

Brandeis while Douglas was chairman of the SEC, Douglas described *Other People's Money* as a "monumental work" which "has been a guiding star and inspiration . . . ."<sup>64</sup> References to Brandeis would make their way into Douglas' judicial opinions more than once.<sup>65</sup>

Central to Justice Brandeis' economic philosophy was "the curse of bigness" which posited that nothing good and everything bad came from large corporations and unchecked corporate growth. To Justice Douglas, this curse was "a blight on the industrial world."<sup>66</sup> His assumption was that companies gained size "not in the interest of efficiency but largely in the interest of monopoly."<sup>67</sup> According to Douglas, large companies cannot be run efficiently because they outgrow the competence of management to manage effectively.<sup>68</sup>

Of course, both of those premises are the polar opposite of much of today's Chicago School philosophy that growth and even monopoly power is often achieved through innovation, the development of new and better products, and because the dominant firm is simply more efficient than its competition. Thus, the emphasis, they assert, is that antitrust should focus on market performance rather than market structure.<sup>69</sup>

Justice Douglas, however, thought it was just a bad idea, as a matter of policy, to permit such wealth and financial power in the hands of so few. In his view, the decisions of those few could tip the national scales towards prosperity or depression.<sup>70</sup> Further, Douglas cautioned that unabated bigness threatened our capitalistic and free enterprise system because it threatened competition, individual initiative and freedom of opportunity.<sup>71</sup> He believed it would transform "a nation of shopkeepers" into "a nation of clerks," which would stifle individual initiative and independence.<sup>72</sup>

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<sup>64</sup>See THE DOUGLAS LETTERS 35 (Melvin I. Urofsky & Philip E. Urofsky eds., 1987).

<sup>65</sup>See, e.g., *United States v. Columbia. Steel Co.*, 334 U.S. 495, 534-36 (1948) (Douglas, J., dissenting) (quoting LOUIS D. BRANDEIS, THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS 105, 114-15, 120-21 (1934) (discussed *infra* notes 179-85)).

<sup>66</sup>DOUGLAS, *supra* note 61, at 187.

<sup>67</sup>*Id.*

<sup>68</sup>See DEMOCRACY AND FINANCE 14 (James Allen ed., 1940); DOUGLAS, *supra* note 61, at 187.

<sup>69</sup>See, e.g., William G. Shepard, *Economic Analysis to Guide Antitrust Enforcement*, 35 N.Y.L. SCH. L. REV. 917, 922-23 (1990); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979).

<sup>70</sup>DEMOCRACY AND FINANCE, *supra* note 68, at 15.

<sup>71</sup>*Id.*

<sup>72</sup>*Id.*; see also DOUGLAS, *supra* note 61, at 187.

Even beyond that, Justice Douglas believed that large corporations fostered dishonesty and “resulted in ruthless sacrifices of human values.”<sup>73</sup> They are so impersonal and remote from their investors, Douglas argued, that management feels free to serve themselves rather than the enterprise they work for. “There can be no question that the laxity in business morals has a direct relationship to the size of business.”<sup>74</sup> One can almost see him saying “I told you so” after the recent Enron, WorldCom and other corporate scandals.<sup>75</sup>

Justices Douglas and Brandeis did part company with respect to resale price maintenance. While Douglas favored the per se rule for any type of vertical price fixing and cited the historic *Dr. Miles* decision with approval,<sup>76</sup> Brandeis thought that *Dr. Miles* was wrongly decided. He believed, along with Justice Holmes, who famously dissented in that case,<sup>77</sup> that producers of goods should be able to control their prices to market.<sup>78</sup> Douglas, in contrast, was concerned about protecting the small businessman, who often was a distributor or retailer subject to manufacturer price controls.<sup>79</sup>

The two also appeared to disagree about the impact on competition of information exchanges by competitors. Justice Douglas was so protective of the price mechanism that he was likely to find any exchange of price information, no matter how informal or infrequent, illegal.<sup>80</sup> In contrast, Justice Brandeis believed that some data exchange, including price in some instances, could be necessary to allow competition to proceed with the lights on.<sup>81</sup> But those differences do not

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<sup>73</sup>DEMOCRACY AND FINANCE, *supra* note 68, at 15-16.

<sup>74</sup>*Id.* at 16.

<sup>75</sup>But of course, many huge corporations, even monopolists, are free from scandal and many smaller companies are not.

<sup>76</sup>*See, e.g.,* Albrecht v. Herald Co., 390 U.S. 145, 154 (1968) (Douglas, J., concurring); White Motor Co. v. United States, 372 U.S. 253 (1963).

<sup>77</sup>*Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 412 (1912) (Holmes, J., dissenting) (“I cannot believe that in the long run the public will profit by this court permitting knaves to cut reasonable prices for some ulterior purpose of their own and thus to impair, if not to destroy, the production and the sale of articles which it is assumed to be desirable that the public should be able to get.”).

<sup>78</sup>*See* LOUIS D. BRANDEIS, BUSINESS – A PROFESSION 243, 245. (1914) (“Why should one middleman have the power to depreciate in the public mind the value of the maker’s brand and render it unprofitable not only for the maker but for other middlemen?”).

<sup>79</sup>*See, e.g.,* Albrecht v. Herald Co., 390 U.S. 145, 154 (1968) (Douglas, J., concurring); White Motor Co. v. United States, 372 U.S. 253 (1963); Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 315 (1949) (Douglas, J., dissenting); United States v. Paramount Pictures, Inc., 334 U.S. 131, 154 (1948).

<sup>80</sup>*See* United States v. Container Corp. of Am., 393 U.S. 333 (1969).

<sup>81</sup>*See, e.g.,* Am. Column & Lumber Co. v. United States, 257 U.S. 377, 413 (1921) (Brandeis, J., dissenting).

significantly diminish the influence of Brandeis on Douglas with regard to the evils of economic concentration.

Justice Douglas' business philosophy was also heavily influenced by the iconoclastic economist and social critic Thorstein Veblen who viewed financial institutions and investors with great skepticism and distrust.<sup>82</sup> So did Douglas, characterizing as "financial termites" those opportunists who prey on other people's money and destroy the legitimate function of finance and investment.<sup>83</sup> Among the several factors that provided hospitable conditions for the termites were the curse of bigness and the centralization of financial power.<sup>84</sup>

Justice Brandeis and Veblen undoubtedly influenced Justice Douglas' efforts to reform Wall Street in the 1930s, where he sought to protect legitimate investors and reduce the influence of Wall Street bankers and lawyers, as well as his views on the proper goals of the antitrust laws. And while the New Deal is famous (infamous?) for the expansion of the federal government as a cure for society's ills, Douglas seemed to resist direct government intervention in both areas.<sup>85</sup> He believed in the merits of capitalism, which was deeply rooted from his boyhood in Yakima, but was suspicious of its manifestations and excesses.<sup>86</sup> His belief in individual initiative and opportunity fostered a view that the antitrust laws should protect competitors. If the antitrust laws could not do the job, then he viewed government regulation as necessary to cure the curse of bigness.<sup>87</sup>

#### IV. PRICE FIXING

It is no small irony that Justice Douglas' first antitrust opinion was his best and was most influential.<sup>88</sup> It came in *United States v. Socony-Vacuum Oil Co.*,<sup>89</sup> when

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<sup>82</sup>See, e.g., Max Lerner, *Wall Street's New Mentor*, THE NATION, Oct. 23, 1937, at 429; HOWARD BALL & PHILLIP J. COOPER, OF POWER AND RIGHT—HUGO BLACK, WILLIAM O. DOUGLAS AND AMERICA'S CONSTITUTIONAL REVOLUTION 45 (1992). Veblen's best known works are his *The Theory of the Leisure Class: An Economic Study of Institutions* (1899) and *The Theory of Business Enterprise* (1904). It was he who coined the term "conspicuous consumption."

<sup>83</sup>DEMOCRACY AND FINANCE, *supra* note 68, at 1, 8, 44.

<sup>84</sup>*Id.* at 14-15.

<sup>85</sup>See, e.g., Skeel, *supra* note 21, at 1092 ("Douglas's vision for progressive reform meant breaking the grip of the Wall Street bankers and lawyers and protecting investors—not direct government control.").

<sup>86</sup>See, e.g., Epstein, *supra* note 63, at 538.

<sup>87</sup>*Id.* at 560.

<sup>88</sup>See, e.g., Vern Countryman, *Mr. Justice Douglas' Contribution to the Law—Business Regulation*, 74 COLUM. L. REV. 366, 366-67 (1974) ("Without doubt, Justice Douglas' greatest contribution to antitrust was his 1940 opinion in the *Socony-Vacuum Oil Co.* case . . . that opinion . . . laid the foundation for the development of an effective antitrust policy for the last three decades."); see also PERITZ, *supra* note 47, at 173 (describing *Socony-Vacuum* as "[p]erhaps the best known and most ruthless evocation of the consumer").

Douglas had been on the Court scarcely a year, and involved a significant government enforcement action against eight major oil companies accused of conspiring to increase the so-called spot market price for gasoline.<sup>90</sup> The defendants sold large amounts of gasoline to jobbers and, in eighty percent of those transactions, the price was dependent on the spot market price. An oversupply of gasoline, however, resulted in smaller independent refiners dumping surplus or distress gasoline on the market, significantly reducing the spot market price.

To remedy the situation, the defendants agreed to purchase distress gas from the independents to stop it from affecting the spot market price. Pursuant to the conspiracy, each defendant had "dancing partners," independent oil companies assigned to the defendants for the purchase of their distress gasoline.<sup>91</sup>

Justice Douglas' recitation of the complex facts was considerably more detailed, forming a substantial part of his nearly 100-page opinion.<sup>92</sup> Although the law was anything but settled, Douglas boldly declared the defendant's scheme unlawful per se, reversing the Seventh Circuit Court of Appeals in a 5-2-2 opinion (Chief Justice

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<sup>89</sup>United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). Thurman Arnold, in his second year as head of the Antitrust Division, argued the appeal himself. Arnold, of course, would become legendary as the Antitrust Division chief who transformed the division and greatly increased government enforcement of antitrust. See Waller, *supra* note 33. He was also Justice Douglas' former colleague, drinking buddy and neighbor when the two taught at Yale together in the early 1930s and remained one of Douglas' closest friends in Washington. See MURPHY, *supra* note 10, at 81, 91-92, 507; SIMON, *supra* note 9, at 116-19, 179 nn.229-30; DOUGLAS, *supra* note 10, at 167-69, 171-72 (describing Arnold as "a brilliant lawyer and wild and wonderful companion").

One of the ironies of *Socony-Vacuum* is that Justices Douglas and Arnold, two former New Dealers, were so instrumental in its decision, which dramatically cut against the underlying policies of the National Recovery Act and the New Deal. See WALLER, *supra* note 18, at 98.

<sup>90</sup>The case had a long, tortured history. The original indictments were brought in late 1936 and encompassed much of the oil industry. After a number of guilty and *nolo contendere* pleas, twenty-six companies and forty-six individuals went to trial. Over 100 lawyers represented the defendants. The trial court dismissed the case against ten companies and sixteen individuals. The remaining defendants were found guilty by the jury, although the trial judge granted new trials to some of the defendants and dismissed the charges against some others. *Socony-Vacuum*, 310 U.S. at 165 n.1. On appeal, the Seventh Circuit granted new trials to all the remaining defendants on the grounds that informal arrangement was not illegal per se and that the trial judge had thus given improper jury instructions as well as improperly excluding much of the defendants' proffered evidence. *United States v. Socony-Vacuum Oil Co.*, 105 F.2d 809, 832-33 (7th Cir. 1930), rev'd, 310 U.S. 150 (1940).

<sup>91</sup>*Socony-Vacuum*, 310 U.S. at 179-80.

<sup>92</sup>Justice Roberts observed that "[t]he opinion fully and fairly sets forth the facts proved at the trial, and to its statement nothing need be added." *Id.* at 255 (Roberts, J., dissenting). Douglas' former colleague at Yale, Walter Hamilton, was more eloquent in his stylistic praise of the opinion:

The Court may insist upon a clean-cut separation between "the recitation of facts" and the "conclusions of law"; and Mr. Justice Douglas may, in an elaborate opinion, which is virtually a Papal Bull to the bishops of the judicial dioceses, give a superb demonstration of how it is done.

Walter H. Hamilton & George D. Braden, *The Special Competence of the Supreme Court*, 50 YALE L.J. 1319, 1370 (1941) (citing *Socony-Vacuum*, 310 U.S. 150).

Hughes and Justice Murphy not participating). In doing so, Douglas made it clear that per se price fixing included any agreement or combination formed to affect prices, even if the agreement did not fix a specific or uniform price.<sup>93</sup> Thus, a conspiracy that "tampers with the price structure" is per se unlawful.<sup>94</sup> The defendants attempt to stabilize the spot market price by reducing oversupply in effect created a price floor which was illegal price fixing. Douglas rejected any notions of reasonableness or the elimination of so-called competitive evils, noting that to do so would open the door to a reasonableness argument in every price fixing case, thus emasculating the Sherman Act, which he regarded as Congress' "charter of freedom."<sup>95</sup>

Although these notions are well settled today, they are so largely because of *Socony-Vacuum*. At that time, *United States v. Trenton Potteries Co.*<sup>96</sup> was the strongest horizontal price fixing precedent extant, but had fallen short of establishing an unequivocal per se rule primarily because the defendants collectively shared eighty-two percent of the market. Although the *Trenton Potteries* Court rejected the defendant's reasonable price defense,<sup>97</sup> it did limit its condemnation to "those controlling in any substantial manner a trade or business."<sup>98</sup> Further, the conspiracy involved "uniform" prices (prices fixed literally and specifically), rather than the type of collective action in *Socony-Vacuum* which merely influenced prices by the removal of part of the market supply.

Further, at the time of *Socony-Vacuum*, Justice Douglas had the inexplicable *Appalachian Coals, Inc. v. United States* case,<sup>99</sup> decided only seven years earlier, to contend with. There, in an industry plagued with excess capacity, 137 coal producers accounting for twelve percent of the national production and up to seventy-five percent of the regional market formed an exclusive selling agent to sell their coal "at the best prices obtainable and, if all cannot be sold, to apportion orders upon a stated basis . . . ."<sup>100</sup> Although the defendant apparently sought government

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<sup>93</sup>*Socony-Vacuum*, 310 U.S. at 222, 223 ("Nor is it important that the prices paid by the combination were not fixed in the sense that they were uniform and inflexible . . . . Under the Sherman Act, a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.").

<sup>94</sup>*Id.* at 224.

<sup>95</sup>*Id.* at 220-21.

<sup>96</sup>*United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927).

<sup>97</sup>*Id.* at 397.

<sup>98</sup>*Id.* at 398. See also LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 183 (1977). Professor Sullivan also noted that while *Trenton Potteries* rejects reasonableness as a defense to price fixing, it does not exclude the possibility that other non-competitive societal goals might sometimes weigh in as a defense. *Id.* at 184.

<sup>99</sup>*Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933).

<sup>100</sup>*Id.* at 358.



approval before commencing operations, not surprisingly, the Antitrust Division responded by obtaining an injunction, asserting that the plan would eliminate competition among the individual coal producers and substantially effect the price of bituminous coal.<sup>101</sup>

The Supreme Court, in an 8-1 opinion written by Chief Justice Hughes, reversed the district court's injunction.<sup>102</sup> It refused to concede that defendants' plan would fix prices and held that the government had failed to establish that any affect on prices would be "detrimental to fair competition."<sup>103</sup> To justify its conclusion, the Court referred to *Trenton Potteries*, where the defendants had collectively dominated the market, to distinguish the situation before it.<sup>104</sup> The Court, however, did leave itself an escape clause, holding that since the case was tried in advance of implementation of defendants' scheme, the government could return to court if their actual operation proved to be an undue restraint of trade.<sup>105</sup>

Thus, in writing the *Socony-Vacuum* decision, Justice Douglas was faced with the seven-year-old *Appalachian Coals* decision with its clear interpretation that *Trenton Potteries* was limited to situations in which the alleged price fixers dominated the market. And while *Appalachian Coals* is today often written off as an outgrowth of the New Deal's National Recovery Act response to the Great Depression,<sup>106</sup> *Socony-Vacuum* was born of the same era in a likewise fundamental fuel supply industry with an identical problem, overcapacity for the present demand.<sup>107</sup> Although the conspiratorial "solution" in the cases differed, both involved plans designed to collectively remove excess supply from the market.

<sup>101</sup>United States v. *Appalachian Coals, Inc.*, 1 F. Supp. 339, 349 (W.D. Va. 1932).

<sup>102</sup>Justice McReynolds dissented but did not write an opinion. *Appalachian Coals*, 288 U.S. at 378.

<sup>103</sup>*Id.* at 373. The Court went on to say that "[a] cooperative [e]nterprise, otherwise free from objection, which carries with it no monopolistic menace, is not to be condemned as an undue restraint merely because it may effect a change in market conditions, where the change would be in mitigation of recognized evils and would not impair, but rather foster, fair competitive opportunities." *Id.* at 373-74.

<sup>104</sup>*Id.* at 375. It also ruled that the elimination of competition among the 137 producer defendants was not sufficient to violate Section 1 since most of the coal that defendants produced was sold outside their region where they faced additional competition. *Id.* at 375-76.

<sup>105</sup>*Id.* at 377-78.

<sup>106</sup>*See, e.g.,* C. PAUL ROGERS III, STEPHEN CALKINS, MARK PATTERSON & WILLIAM R. ANDERSEN, *ANTITRUST LAW: POLICY AND PRACTICE* 246 (4th ed. 2008); STEPHEN F. ROSS, *PRINCIPLES OF ANTITRUST LAW* 133 (1992).

<sup>107</sup>Indeed, in both cases the defendants sought government assistance to develop and initiate their plans to reduce serious oversupply problems as part of the New Deal's National Recovery Act. Compare *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 364-65 (1933) with *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 171-73 (1940). In *Socony-Vacuum*, Justice Douglas flatly rejected the argument that the government's (Petroleum Administrative Board) knowledge or even acquiescence in the "dancing partner" scheme was a defense. *Socony-Vacuum*, 310 U.S. at 225-28.

Thus, one might assume the second youngest man ever appointed to the Supreme Court might be reluctant to draft such a sweeping opinion, given *Appalachian Coals* and the deference such a junior justice would seemingly give his new brethren. Of course, New Deal politics suggests otherwise. Much had happened in the intervening seven years between the *Appalachian Coals* and *Socony-Vacuum* decisions. The Franklin Roosevelt presidency had inherited a Supreme Court occupied by Justices Willis Van Devanter, Pierce Butler, James C. McReynolds and George Sutherland, who together would come to be known as "the Four Horsemen" for their ironclad and uniform opposition to the legislative reforms of the New Deal.<sup>108</sup> Their obstinacy precipitated President Roosevelt's infamous Court-packing plan, which went up in smoke in 1937.<sup>109</sup> As it turned out, however, all was not lost as, through normal attrition, President Roosevelt was able to appoint Justice Hugo Black in 1937 to succeed the retiring Justice Willis Van Devanter, and Felix Frankfurter and Douglas in 1939, to replace Justices Cardozo and Brandeis, respectively.<sup>110</sup> Thus, began what is widely referred to as the "Judicial Revolution."<sup>111</sup>

In writing the sweeping *Socony-Vacuum* opinion, Justice Douglas did have to deal with *Appalachian Coals*. He did not do so very convincingly, although that is not to say anyone else could have done better in dealing with that aberrant decision. According to Douglas, the cases had little in common except for "the presence in each of so-called demoralizing or injurious practices."<sup>112</sup> He characterized the collective action in each as "quite divergent" since the *Appalachian Coals* plan "was

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<sup>108</sup>See, e.g., WHITE, *supra* note 5, at 178-99. Learned Hand, in contrast, dubbed Justices Brandeis, Cardozo, and Stone, who distrusted the New Deal but did not uniformly oppose it, the "Three Musketeers." *Id.* at 211.

<sup>109</sup>Of course, the mercurial Justice Owen Roberts probably played an important role in heading off the Court-packing plan when he switched his vote in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), resulting in a 5-4 decision upholding the constitutionality of the National Labor Relations Act. A year earlier, in a very similar case, he had joined the Four Horsemen in striking down the Act. Roberts' position change became known as "the switch in time that saved nine." For a full account of the Court-packing plan, see JOSEPH ALSOP & TURNER CATLEDGE, *THE 168 DAYS* (1938). See also GERALD T. DUNNE, *HUGO BLACK AND THE JUDICIAL REVOLUTION* 161-73 (1977); ROGER K. NEWMAN, *HUGO BLACK: A BIOGRAPHY* 205-19 (1994).

<sup>110</sup>One Justice Douglas biographer observed that by the time Douglas was sworn in on April 17, 1939, "it was clear that Roosevelt had lost the Court-packing plan but won the Court." SIMON, *supra* note 9, at 199.

<sup>111</sup>See Hamilton & Braden, *supra* note 92. Of course, most of the attention on the "new" Court concerned its expansion of civil liberties, shift in constitutional theory, and expansion of the role of the federal government. See, e.g., Vincent M. Barnett, Jr., *Constitutional Interpretation and Judicial Self-Restraint*, 39 MICH. L. REV. 213 (1940); Kenneth Culp Davis, *Revolution in the Supreme Court*, 166 ATLANTIC MONTHLY 85 (1940); Thomas Reed Powell, *Changing Constitutional Phases*, 19 B.U. L. REV. 509 (1939); Frank J. Hogan, *Important Shifts in Constitutional Doctrine*, 25 A.B.A. J. 629 (1939). See also DUNNE, *supra* note 109.

<sup>112</sup>*Socony-Vacuum Oil Co.*, 310 U.S. at 216.

not designed to operate vis-à-vis the general consuming market and to fix the prices on that market.”<sup>113</sup> He further characterized the *Appalachian Coal* plan as “not only incidental but also highly conjectural” because it was entirely prospective.<sup>114</sup>

These are at best make-weight distinctions. It is impossible to explain how a scheme to remove distress coal from the supply of coal to be sold to coal consumers such as public utilities differs in any meaningful way from a scheme to remove distress gasoline from the supply of gasoline sold to jobbers or middlemen. Can the effect on the “general consuming market” for gasoline somehow differ from that for coal? Further, the so-called prospective nature of the coal scheme is a distinction without a difference. Justice Douglas was happy to apply basic economic analysis, not to mention general common sense, to the facts of *Socony-Vacuum*. If part of the supply is removed from a market, the price, given constant demand, will tend to increase. Application of the same fundamental truths in *Appalachian Coals* would have led inalterably to the same foolproof prediction.<sup>115</sup>

Of course, Justice Douglas’ *Socony-Vacuum* opinion effectively overrules, not distinguishes *Appalachian Coals*.<sup>116</sup> In reality, Douglas dismantled the “excessive” competition argument accepted by the Court in *Appalachian Coals*.<sup>117</sup> In doing so, he harkened back to the early cartel cases such as *United States v. Trans-Missouri Freight Association*<sup>118</sup> and *United States v. Addyston Pipe & Steel*,<sup>119</sup> in which the Court had early on rejected ruinous competition defenses in favor of the free market.<sup>120</sup> According to Douglas, if allowed, competitive abuses would be proffered

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<sup>113</sup>*Id.* Justice Douglas’ nod to consumers in attempting to distinguish *Appalachian Coals* is not without irony since he so often sought to protect competitors, particularly small inefficient ones, at the ultimate expense of consumers. See, e.g., *Albrecht v. Herald Co.*, 390 U.S. 145, 154 (1968) (Douglas, J., concurring); *White Motor Co. v. United States*, 372 U.S. 253 (1963); *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 315 (1949) (Douglas, J., dissenting); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); see *infra* text accompanying notes 494-518.

<sup>114</sup>*Socony-Vacuum*, 310 U.S. at 216.

<sup>115</sup>In *Appalachian Coals*, the whole reason for the plan was to reduce supply and eliminate “destructive competition” between 137 coal producers. 288 U.S. at 359.

<sup>116</sup>*Accord* ROSS, *supra* note 106, at 131.

<sup>117</sup>Justice Douglas noted that every cartel could proffer a ruinous competition justification and flatly rejected the notion that competition could be sufficiently “ruinous” to be against the public interest as embodied in the Sherman Act. *Socony-Vacuum*, 310 U.S. at 221.

<sup>118</sup>*United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290 (1897). See also *United States v. Joint Traffic Ass’n*, 171 U.S. 505 (1898).

<sup>119</sup>*United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271 (6th Cir. 1898), *aff’d*, 175 U.S. 211 (1899).

<sup>120</sup>*Trans-Missouri Freight*, 166 U.S. at 332; *Addyston Pipe*, 85 Fed. at 283.

as a justification for every price fixing conspiracy, in direct contradiction to the free market philosophy underlying the Sherman Act.<sup>121</sup>

Justice Douglas, however, was not content to end with a reaffirmation of *Trans-Missouri* and *Addyston Pipe & Steel*. Instead, in dicta in his now famous footnote 59 he made it clear that the per se rule for price fixing did not require a showing of market power or dominance.<sup>122</sup> With this dictum, Douglas usefully closed the door left ajar in *Trenton Potteries*.<sup>123</sup> He did not stop there, however, but went on to write that a conspiracy that has the purpose or intent to affect prices is all that is necessary for Sherman Act condemnation, even where no "overt act" or actual affect is shown.<sup>124</sup> Thus, a mere conspiracy to fix prices, as that term is broadly defined in the opinion, violates Section 1 even if effect is lacking.

As a result of the footnote 59 dicta, the per se rule for price fixing is both simplified and significantly expanded.<sup>125</sup> Proof of market power is dispensed with and either a purpose (or intent) to fix prices or a purpose and effect on prices brings on the per se rule.<sup>126</sup>

With the broad, sweeping dicta of footnote 59, Justice Douglas began to sow the seeds of a reputation as an activist judge. Douglas could have written the *Socony-Vacuum* decision by reference to *Trenton Potteries*, *Trans-Missouri*, and *Addyston Pipe & Steel* and by distinguishing *Appalachian Coals*, as he unconvincingly tried to do. The only doctrinal expansion necessary to support the result in the case had to do with expanding the definition of price fixing beyond literal or actual fixed prices.

In subsequent decisions, Justice Douglas reaffirmed his expansive interpretation of price fixing.<sup>127</sup> In his view, "[p]rice fixing in any form is perhaps the most powerful of all inducements for abandonment of competition."<sup>128</sup>

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<sup>121</sup>*Socony-Vacuum*, 310 U.S. at 220-21.

<sup>122</sup>*Id.* at 224 n.59. See also, e.g., E. THOMAS SULLIVAN & JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS 130 (4th ed. 2003).

<sup>123</sup>See sources cited *supra* notes 97-98 and accompanying text.

<sup>124</sup>"[A] conspiracy to fix prices violates [Section] 1 of the Act though no overt act is shown, though it is not established that the conspirators had the means available for accomplishment of their objective . . ." *Socony-Vacuum*, 310 U.S. at 224 n.59.

<sup>125</sup>See, e.g., Spencer Weber Waller, *Antitrust and American and American Business Abroad Today*, 44 DEPAUL L. REV. 1251, 1256 (1995), characterizing footnote 59 as "formulating the strictest possible *per se* condemnation of agreements between competitors affecting the pricing mechanism."

<sup>126</sup>That leaves so-called "effect only" cases, in which there is no proof of purpose or intent to fix prices, as the only possible circumstances for application of the rule of reason and consideration of justifications for the restraint. See, e.g., *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978).

<sup>127</sup>See *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 143 (1948) (majority opinion condemning a horizontal price fixing conspiracy to fix the prices of first run movies); *United States v. Masonite Corp.*, 316 U.S. 265 (1942) (majority opinion holding that

He expressed similar sentiments in *United States v. National Association of Real Estate Boards*, in which the Court considered whether real estate commissions fixed by a real estate board were simply fees or could be considered wages and thus under the labor exemption.<sup>129</sup> Justice Douglas, writing for a six-judge majority with two judges not participating, ruled that price fixing prohibitions applied to services as well as goods and that prices fixed by the board were fees, not wages, because real estate brokers are independent entrepreneurs, not employees.<sup>130</sup> As a result, he rejected defendants' assertion that the fixed commissions should fall within the statutory labor law exemption. He also took pains to characterize defendants' actions as illegal price fixing, even though they were authorized by the board's "code of ethics" and were "non-mandatory" in the sense that defendants imposed no penalties for deviation from the prescribed fee percentage.

Justice Douglas also again rejected any consideration of the relevance of a reasonableness defense, writing:

It is not for the courts to determine whether in particular settings price-fixing serves an honorable or worthy end. An agreement, shown either by adherence to a price schedule or by proof of consensual action, fixing the uniform or minimum price, is in itself illegal under the Sherman Act, no matter what end it was designed to serve.<sup>131</sup>

Thus, he at once applied price fixing to the rendering of personal services, again shut the door to reasonableness arguments, and made it clear that exceptions were not lightly or easily to be allowed.<sup>132</sup>

Justice Douglas took his view that the Sherman Act was "the charter of freedom" quite literally, generally refusing to allow the Sherman Act to be displaced by other legislation. For example, in *Schwegmann Brothers v. Calvert Distillers Corp.*, Douglas, writing for a 6-3 majority, ruled that the non-signor provision in the

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restrictive licensing by patent holder amounted to price fixing); *Wayne Pump Co. v. United States*, 317 U.S. 200, 210 (1942) (dissenting against the dismissal of a criminal price fixing complaint for insufficiency and indefiniteness).

<sup>128</sup> *United States v. Line Material Co.*, 333 U.S. 287, 320 (1948) (Douglas, J., concurring). He went on to state:

[Price fixing] offers security and stability; it eliminates much of the uncertainty of competitive practices; it promises high profits. It is therefore one of the most effective devices to regiment whole industries and exact a monopoly price from the public. The benefits of competition disappear. The prices charged by the regimented industry are determined not by representatives of the public . . . but by private parties who incline to charge all the traffic will bear.

*Id.*

<sup>129</sup> *United States v. Nat'l Ass'n of Real Estate Bds.*, 339 U.S. 485 (1950).

<sup>130</sup> *Id.* at 490-91.

<sup>131</sup> *Id.* at 489.

<sup>132</sup> See Note, *Price-Fixing of Services Under the Sherman Act*, 45 ILL. L. REV. 115, 120 (1950).

Louisiana fair trade law, which purportedly bound all retailers to maintain retail prices fixed by a manufacturer once one retailer signed an agreement to do so, was not authorized by the federal Miller-Tydings Act, which exempted state authorized resale price agreements from the Sherman Act.<sup>133</sup>

The *Schwegmann* decision, which today because of the repeal of the Miller-Tydings Act in 1975 is of historical interest only, “was met with banner headlines, wailing, rejoicing, and some retail bedlam.”<sup>134</sup> It effectively denuded the effectiveness of state fair trade price fixing since non-signers could not be bound to the established price and could thus cut prices without violating state law.<sup>135</sup> *Schwegmann* was decided on May 21, 1951, and by May 28, Macy’s Department Store in New York City, a perennial non-signer, had cut prices six percent on about 6,000 consumer items. Long-time rival Gimbel’s and every other major New York department store quickly followed suit.<sup>136</sup>

Congress, however, quickly acted to rehabilitate state fair trade law, passing the McGuire Act in 1952. That Act sanctioned state non-signer provisions, effectively overruling *Schwegmann*.<sup>137</sup> Both the McGuire Act and Miller-Tydings Act were

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<sup>133</sup>*Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951). The Miller-Tydings Act was passed in 1937 to amend the Sherman Act in response to wholesaler and retailer objections to the condemnation of vertical price fixing under *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). By 1941 all but Vermont, Texas, and Missouri had enacted fair trade statutes which provided, in substance, that there was nothing illegal about a contract specifying the resale price of a trade-marked or similarly identified commodity. The state laws also specified that knowingly advertising or selling a commodity at less than the specified price amounted to unfair competition and gave rise to a right of action by any injured party. See ROBERT PITOFKY, ET AL., *TRADE REGULATION: CASES AND MATERIALS* 643 (5th ed. 2003).

<sup>134</sup> See James A. Rahl, *Resale Price Maintenance, State Action and the Antitrust Laws: Effect of Schwegmann Brothers v. Calvert Distillers*, 46 ILL. L. REV. 349, 350 (1951) (“the most spectacular trade regulation decision in years”); John P. Frank, *The United States Supreme Court Term: 1950-51*, 19 U. CHI. L. REV. 165, 175 (1952) (“The *Schwegmann* case created a sensation.”).

<sup>135</sup> See, e.g., C. Paul Rogers III, *The State Action Antitrust Immunity*, 49 U. COLO. L. REV. 147, 156 n.47 (1978).

<sup>136</sup> Alfred R. Zipser, Jr., *Macy’s Cuts Prices 6% on ‘Fixed’ Items; A ‘War’ is Foreseen*, N.Y. TIMES, May 29, 1951, at 1. Apparently the price war remained front page news for week afterwards. See Frank, *supra* note 134, at 176. Department store retail price-cutting also “broke loose” in Detroit and Denver as stores scrambled to reduce high inventories. Rahl, *supra* note 134, at 350 n.5.

<sup>137</sup> McGuire Bill, Pub. L. No. 542, 66 Stat. 632 (1952); 15 U.S.C. § 45 (2006).

repealed by Congress in 1975, however, effectively sending state fair trade laws packing.<sup>138</sup>

In reaching his conclusion in *Schwegmann*, Justice Douglas relied heavily upon the legislative history of the Miller-Tydings Act in concluding that the Act did not include non-signers. That he got it wrong was made clear by the Report of the House Committee on Interstate and Foreign Commerce, which accompanied the McGuire Act.<sup>139</sup> Even his fellow realist and former colleague at Yale, John Frank, found that "as a bit of statutory construction, the case was, to put it sedately, novel . . . ."<sup>140</sup>

A close look at Justice Douglas' statutory construction in *Schwegmann* does reveal some judicial sleight of hand. He begins by noting that the language of the Miller-Tydings Act sanctioned only state-authorized contracts or agreements prescribing minimum prices for resale.<sup>141</sup> The normal and customary meaning of "contracts or agreement," he asserted, does not include non-signers to state-authorized resale price maintenance schemes.<sup>142</sup> In referring to the legislative history, however, he notes the House Report specifically mentioned non-signers as within the ambit of the bill. He concludes, however, that the House Report should not control because the bill that the report endorsed was later amended before it became law.<sup>143</sup> The minor language changes in the amendment had nothing to do,

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<sup>138</sup>By that time, at least twenty-four state supreme courts had held their state fair trade laws unconstitutional in toto or with respect to the nonsigner provision, and six state legislatures had repealed at least the non-signer portion of their law. See MILTON HANDLER, ET AL., *TRADE REGULATION: CASES AND MATERIALS* 574-80 (1975).

<sup>139</sup>The primary purpose of the [McGuire] bill is to reaffirm the very same proposition which, in the committee's opinion, the Congress intended when to enact into law when it passed the Miller-Tydings Act. . . . The end result of the [Schwegmann] decision has been seriously to undermine the effectiveness of the Miller-Tydings Act and, in turn, of the fair-trade laws enacted by 45 States. HR 5767, as amended, is designed to restore the effectiveness of these acts by making it abundantly clear that Congress means to let State fair-trade laws apply in their totality; that is, with respect to non-signers as well as signers.  
H.R. Rep. No. 82-1437 at 1-2 (1952). See also *Hudson Distribs. v. Eli Lilly & Co.*, 377 U.S. 386, 391-92 (1964).

<sup>140</sup>Frank, *supra* note 134, at 175.

<sup>141</sup>*Schwegmann Bros.*, 341 U.S. at 387-88.

<sup>142</sup>*Id.* at 388.

<sup>143</sup>*Id.* at 392-93.

however, with the non-signer coverage urged in the House Report,<sup>144</sup> despite Douglas' weak attempt to say that it did.<sup>145</sup>

Although fair trade legislation was largely the product of small retailers who believed themselves undercut by larger rivals, particularly chain store outlets,<sup>146</sup> Justice Douglas' aversion to price fixing, even of the vertical variety, was stronger than his sympathy for the independent retailer. For it was the larger retailers, such as Macy's and Gimbel's, that were likely to be the non-signers. One might conclude that in fact Douglas was exhibiting a pro-consumer bias, since by protecting non-signers he left the way open for continuing price cutting.<sup>147</sup>

Justice Douglas' anathema to price fixing showed itself in patent cases as well, although his dislike of the rights flowing from patent law was perhaps even stronger.<sup>148</sup> In *United States v. Line Material Co.*,<sup>149</sup> for example, he agreed with the Court that a patentee could not use a cross-licensing agreement to control the price of another patented article. As he made clear, however, in a concurrence joined by

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<sup>144</sup> "[O]ther conditions" was deleted from language which formerly read "nothing herein contained shall render illegal contracts, or agreements prescribing minimum prices or other conditions for the resale of" specified commodities. *Id.* at 386.

<sup>145</sup> See Frank, *supra* note 134, at 176 (noting that Justice Douglas' argument was "weakened by the fact that the language changes had no perceptible relation to the minimum price clauses here in issue"). Justices Jackson and Minton concurred but slammed Douglas for his selective use of legislative history to support his result. *Schwegmann Bros.*, 341 U.S. at 395-96 (Jackson, J., concurring). Justice Frankfurter, joined by Justices Black and Burton, vigorously dissented and attached both the House and Senate Reports to establish that Congress clearly intended non-signers to be covered. *Id.* at 397 (Frankfurter, J., dissenting).

<sup>146</sup> See, e.g., A.D. NEALE, *THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA* 293-99 (2d ed. 1970); GEORGE W. STOCKING & MYRN W. WATKINS, *MONOPOLY AND FREE ENTERPRISE* 321-25 (1951); Rahl, *supra* note 134, at 351-52.

<sup>147</sup> The decision also suggests that Justice Douglas prefers federal over state economic regulation since his reading of the legislative history of the Miller-Tydings Act is that Congress needs to be crystal clear when delegating economic regulatory authority to the states. *Schwegmann Bros.*, 341 U.S. at 395.

<sup>148</sup> See *infra* text accompanying notes 237-55. See also Justice Douglas' majority opinions in *Funk Brothers Seed Co. v. Kalb Inoculant Co.*, 333 U.S. 127 (1948), *General Electric Co. v. Jewel Incandescent Lamp Co.*, 326 U.S. 242 (1945), *Mercoird Corp. v. Mid-Continent Investment Co.*, 320 U.S. 661 (1944), *Mercoird Corp. v. Minneapolis Honeywell Regulator Co.*, 320 U.S. 680 (1944), *United States v. Masonite Corp.*, 316 U.S. 265 (1942), *Cuno Engineering Corp. v. Automatic Devices Corp.*, 314 U.S. 84 (1941). See also *Special Equip. Co. v. Coe*, 324 U.S. 370, 380 (1945) (Douglas, J., dissenting). Cf. *Transparent-Wrap Mach. Corp. v. Stokes & Smith Co.*, 329 U.S. 637 (1947). See also Epstein, *supra* note 63, at 558-59.

<sup>149</sup> *United States v. Line Material Co.*, 333 U.S. 287 (1948).



three other justices,<sup>150</sup> he would go further and invalidate the ability of the patent holder to control the price charged by licensees.<sup>151</sup>

In his view, the patent laws, through their silence on the issue, did not authorize price-fixing agreements.<sup>152</sup> The Court had, by permitting the patent holder to fix prices, "saddled the economy with a vicious monopoly."<sup>153</sup> According to Justice Douglas, when the patentee controls the price charged by licensees, "[c]ompetition tends to become impaired not by reason of the public's preference for the patented article but because of the preference of competitors for price fixing and for the increased profits which that method of doing business promises."<sup>154</sup>

In his concurrence in *Line Material*, Justice Douglas took pains to characterize price fixing as "perhaps the most powerful of all inducements for abandonment of competition."<sup>155</sup> It is clear that he still felt that way twenty-one years later when he wrote for the Court in *United States v. Container Corporation of America*.<sup>156</sup> That case involved a challenge to a practice in the corrugated container industry of providing price quotes to competitors when asked. The price exchanges were characterized as infrequent and irregular but Douglas, writing for a 5-3-1 majority, made short work of finding a violation of Section 1.<sup>157</sup> In doing so, he managed to inject great confusion and uncertainty into the state of the law.

The main difficulty is that the opinion is so vague and conclusive that one is left guessing as to whether the Court has just articulated a new per se rule or applied the rule of reason.<sup>158</sup> First, Justice Douglas characterized the case as within the per se

<sup>150</sup>*Id.* at 315. They were Justices Black, Murphy and Rutledge.

<sup>151</sup>*Id.* Justice Douglas acknowledged that to do so would necessitate overruling prior decisions such as *United States v. General Electric Co.*, 272 U.S. 476 (1926), and *Bement v. National Harrow Co.*, 186 U.S. 70 (1902).

<sup>152</sup>*Line Material Co.*, 333 U.S. at 318.

<sup>153</sup>*Id.* at 318. He went on to observe that "[b]y protecting [the patent holder] against competition from low-cost producers, it strengthens and enlarges his monopoly." *Id.* at 319.

<sup>154</sup>*Id.*

<sup>155</sup>*Id.* at 320. See also Justice Douglas' majority opinion in *Masonite Corp.*, 316 U.S. at 281 ("[C]ontrol over prices [of competing patented goods] thus becomes an actual or potential brake on competition.").

<sup>156</sup>*United States v. Container Corp. of Am.*, 393 U.S. 333 (1969).

<sup>157</sup>*Id.* at 335. The majority opinion is about three and a half pages long in the U.S. Reporter while Justice Marshall's dissent is more than twice that length.

<sup>158</sup>Law review commentators strained to interpret *Container*. See, e.g., Note, *Antitrust Liability for an Exchange of Price Information—What Happened to Container Corporation?*, 63 VA. L. REV. 639, 654 (1977) (modified per se rule established); James M. Kefauver, *The*

ban of *Socony-Vacuum*.<sup>159</sup> In the very next sentence he seemed to reverse direction completely, writing that "[p]rice information exchanged in some markets may have no effect on a truly competitive price."<sup>160</sup> Reading and rereading the passage, one gets the feeling of a letter that is dictated but not read. Further, his subsequent cursory analysis of the corrugated container market and finding of an effect on price leaves one wondering just when price exchanges might be allowed.

In the opinion, Justice Douglas noted that the industry was expanding, had excess capacity, ease of entry, an inelastic demand and, not surprisingly, downward price trends.<sup>161</sup> Nonetheless, he found, seemingly without any supporting evidence, that the price exchanges had the effect of slowing the general price decline in the industry.<sup>162</sup> His antipathy to any potential interference with price competition or the price mechanism was so strong that he was willing to assume an effect on price, even when industry conditions suggested otherwise.<sup>163</sup> Douglas ended the brief opinion with "[p]rice is too critical, too sensitive a control to allow it to be used even in an informal manner to restrain competition."<sup>164</sup>

Justice Fortas concurred to attempt to clarify the majority opinion, stating that he did not read the majority as enacting a per se rule for exchanges of price information.<sup>165</sup> Justice Marshall, joined by Justices Harlan and Stewart, wrote a pointed, somewhat sarcastic dissent, stating that he "would prefer that a finding of anticompetitive effect be supported by 'evidence in the record.'"<sup>166</sup> He concluded

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*Legality of Dissemination of Market Data by Trade Associations: What Does Container Hold?*, 57 CORNELL L. REV. 777, 785-86 (1972) (no per se rule); Note, *Antitrust Implications of the Exchange of Price Information Among Competitors: The Container Corporation Case*, 68 MICH. L. REV. 720, 730-31 (1970) (no per se rule).

<sup>159</sup>His exact language is "[t]he limitation or reduction of price competition brings the case within the ban, for as we held in *United States v. Socony-Vacuum Oil Co.*, . . . interference with the setting of price by free market forces is unlawful per se." *Container*, 393 U.S. at 337.

<sup>160</sup>*Id.* at 337.

<sup>161</sup>*Id.* at 336-37.

<sup>162</sup>*Id.* at 336.

<sup>163</sup>Arguably Justice Douglas' approach in *Container* is at least consistent with *Socony-Vacuum*, 310 U.S. at 224 n.59, in which he posits that a conspiracy to affect prices is unlawful even though no effect on prices is shown.

<sup>164</sup>*Container*, 393 U.S. at 338.

<sup>165</sup>*Id.* at 338-39 (Fortas, J., concurring).

<sup>166</sup>*Id.* at 344 (Marshall, J., dissenting). Justice Marshall also did "not find the inference that the exchange of price information has had an anticompetitive effect as 'irresistible' as does the Court." *Id.*

that in the corrugated container market, where total demand was increasing and entry was easy, "it [was] just as logical" that competitors would try to capture market share by cutting prices as by maintaining them through occasional price exchanges.<sup>167</sup>

Not surprisingly, Justice Marshall interpreted the Douglas majority as establishing a *per se* rule for price exchanges, spending the first four paragraphs of his dissent pointing out why the *per se* rule should be inapplicable to price exchange agreements.<sup>168</sup> He noted that the Court had historically refused to apply a *per se* rule to exchanges of price and market information.<sup>169</sup> Douglas, in contrast, had largely ignored precedent in his majority opinion, citing the earlier trade association cases sparingly, if at all.

One cannot read the Douglas majority and the Marshall dissent in *Container* without concluding that the dissent is by far the strongest, best reasoned opinion of the two. Marshall effectively dismantled the Douglas majority opinion for reaching conclusions about the occasional price exchanges' effect on price "[i]n the absence of any proof whatsoever."<sup>170</sup>

Nonetheless, *Container* was now the law and it took the Supreme Court six years to clear up the confusion that Justice Douglas had wrought. In *United States v. Citizens & Southern National Bank*, a case involving the dissemination of interest rates and service charges by a parent bank to branch banks in which, due to Georgia law, the parent could own no more than a five percent interest, the Court stated "the dissemination of price information is not itself a *per se* violation of the Sherman Act."<sup>171</sup> To support its statement the Court cited two old trade association cases<sup>172</sup> and Justice Fortas' concurring opinion in *Container*.

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<sup>167</sup>*Id.* at 343. Marshall pointed out that because industry demand is inelastic, price changes do not have an immediate bearing on quantities purchased. Given the uncertainty about likely effect, he would have required the government to prove an anticompetitive purpose or effect. *Id.*

<sup>168</sup>*Id.* at 340-42.

<sup>169</sup>*Id.* at 341 (citing *Cement Mfrs. Protective Ass'n v. United States*, 268 U.S. 588 (1925); *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563 (1925); *United States v. Am. Linseed Oil Co.*, 262 U.S. 371 (1923); *Am. Column & Lumber Co. v. United States*, 257 U.S. 377 (1921)).

<sup>170</sup>*Container*, 333 U.S. at 345.

The Government admits that the price trend was down, but asks the Court to assume that the trend would have been accelerated with less informed, and hence more vigorous, price competition. In the absence of any proof whatsoever, I cannot make such an assumption. It is just as likely that price competition was furthered by the exchange as it is that it was depressed.  
*Id.* at 345-46 (citation omitted).

<sup>171</sup>*United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 113 (1975).

<sup>172</sup>*Maple Flooring Ass'n*, 268 U.S. 563; *Cement Mfrs. Protective Ass'n*, 268 U.S. 588.

The Court then concluded that the sharing of information, given the branch banking restrictions then in place, did not violate Section 1 of the Sherman Act.<sup>173</sup> Not surprisingly, Justice Douglas joined in a three-judge dissent authored by Justice Brennan.<sup>174</sup> The dissent concluded that the government had established a Section 1 violation flowing from the dissemination of interest and fee information. Although the dissent did not directly dispute the majority's application of the rule of reason to price sharing and exchanges, it did remark that the difficulty of applying the rule of reason "has in many cases led us to prefer per se rules."<sup>175</sup>

In spite of *Citizens & Southern National Bank's* clarification of price exchanges as subject to the rule of reason, the fallout from *Container* nonetheless affected the next price dissemination case to reach the Supreme Court. That case, *United States v. United States Gypsum Co.*, involved a criminal challenge to a practice of interseller price verification within the gypsum wallboard industry.<sup>176</sup> It is almost unheard of for the Antitrust Division of the Department of Justice to criminally prosecute an offense subject to the rule of reason;<sup>177</sup> thus, raising the question, why did it in *U.S. Gypsum*? The answer may never be known with certainty but a good guess is that, since the *U.S. Gypsum* prosecution began well before the Court's decision in *Citizens & Southern National Bank*, the Justice Department believed it was dealing with a per se case, based on *Container*.<sup>178</sup>

Unfortunately, the *U.S. Gypsum* decision itself created confusion since one of the issues before the Court was whether proof of intent was a necessary element of a criminal antitrust violation. The Court held that it was and that the standard was a showing that the action was "undertaken with knowledge of its probable

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<sup>173</sup>*Citizens & S. Nat'l Bank*, 422 U.S. at 113-14.

<sup>174</sup>*Id.* at 130 (Brennan, J., dissenting).

<sup>175</sup>*Id.* at 142. *Citizens & Southern National Bank* is almost surely a case whose outcome can directly be traced to the change in Supreme Court personnel between 1969 and 1975 as the Warren Court was transforming into the Burger Court. Chief Justice Burger, and Justices Blackmun, Powell and Rehnquist, all new appointees, were part of Justice Stewart's six-judge majority. *Id.* at 86 (majority opinion). Justice Marshall, author of the dissent in *Container*, which Justice Stewart had joined, was the sixth justice in the *Citizens & Southern National Bank* majority. *Citizens & S. Nat'l Bank*, 422 U.S. at 86. Further, the three dissenting justices in *Citizens & Southern National Bank*, 422 U.S. at 130 (Brennan, J., dissenting), Warren Court holdovers Douglas, Brennan and White, were all in the majority in *Container*, 393 U.S. at 333. Thus, with the changes in the Court's makeup, Justices Marshall and Stewart had the votes to outflank Justice Douglas.

<sup>176</sup>*United States v. U.S. Gypsum Co.*, 438 U.S. 422, 427 (1978).

<sup>177</sup>*See, e.g.,* WEAVER, *supra* note 18.

<sup>178</sup>In addition, the interseller price verification in *U.S. Gypsum* was much more systematic and widespread than were the "infrequent" price exchanges in *Container*, probably leading the Antitrust Division to believe they had a much stronger per se case than even *Container*.

consequences.”<sup>179</sup> Since the Court again took pains to point out that price exchanges among competitors fell under the rule of reason,<sup>180</sup> it was uncertain whether the *U.S. Gypsum* intent standard applied to per se offenses as well.<sup>181</sup> The circuit courts almost uniformly held that it did not,<sup>182</sup> thus rendering that part of the *U.S. Gypsum* decision largely moot, since criminal prosecutions in rule of reason cases are so unusual.

The root of all this uncertainty probably lies with Justice Douglas’ poorly drafted, poorly reasoned opinion in *Container*. The government would not likely have criminally prosecuted the *U.S. Gypsum* case had *Container* provided better guidance, and the issue of criminal intent and the litigation it spawned would have been avoided.<sup>183</sup>

Justice Douglas certainly understood the anticompetitive consequences that collaborations of competitors could have on the market and on consumers. In his view, no collective action that might affect the price mechanism should be tolerated. As a result, he did not consider countervailing market conditions nor did he require that the government establish a strong factual basis for its assertions of anticompetitive effect. In reality, he reduced the government’s burden of proof. The Douglas approach certainly was effective in a case like *Socony-Vacuum* where intent was clear and effect irrefutable. But in a closer case such as *Container*, where intent was uncertain and competitive effect problematic, his summary disposition was based on nothing more than the effect occasional price exchanges *might* have on price levels rather than any showing of *actual* effect.

In further contrast to Justice Douglas’ careful and thorough *Socony-Vacuum* opinion, his opinion in *Container* is inexplicably vague and seemingly contradictory. While asserting that the price exchanges in *Container* bring it within the per se prohibition of *Socony-Vacuum*, he in the very next sentence acknowledges that

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<sup>179</sup>*U.S. Gypsum*, 438 U.S. at 444.

<sup>180</sup>*Id.* at 441 n.16.

<sup>181</sup>See, e.g., C. Paul Rogers III, *Criminal Intent in Antitrust Prosecutions, Collateral Estoppel, and Section 5(a) of the Clayton Act, and the Relationship of Standing and Injury in Private Antitrust Suits*, 56 CHI.-KENT L. REV. 45 (1980).

<sup>182</sup>See, e.g., *United States v. Brown*, 936 F.2d 1042, 1046 (9th Cir. 1991); *United States v. Coop. Theatres of Ohio, Inc.*, 845 F.2d 1367, 1373 (6th Cir. 1988); *United States v. W.F. Brinkley & Son Constr. Co.*, 783 F.2d 1157, 1162 (4th Cir. 1986); *United States v. Koppers Co.*, 652 F.2d 290, 296 n.6 (2d Cir. 1981); *United States v. Foley*, 598 F.2d 1323, 1335 (4th Cir. 1979); *United States v. Gillen*, 599 F.2d 541, 545 (3d Cir. 1979); *United States v. Brighton Bldg. & Maint. Co.*, 598 F.2d 1101, 1106 (7th Cir. 1979).

<sup>183</sup>That is not to say that the Supreme Court would not have granted certiorari in *U.S. Gypsum*. That case contained a second issue, the use of the Robinson-Patman Act’s meeting competition defense to justify an interseller price verification program, which alone, might have caught the Court’s attention. *U.S. Gypsum*, 438 U.S. at 426.

"[p]rice information exchanged in some markets may have no effect on a truly competitive price."<sup>184</sup> Of course, the accepted wisdom of per se rules is that a given restraint is so labeled only when it is always competitively pernicious.<sup>185</sup> Thus, it is little wonder that confusion reigned about what standard, if any, the *Container* decision set forth for price exchanges among competitors.<sup>186</sup>

In *Socony-Vacuum*, Justice Douglas extended the per se rule against price fixing beyond literal price fixing to any collective activity that interferes with the price setting mechanism of the market. He recognized that no gray area could exist since any affect on price by collective action disrupts the market. He arguably went too far in the dicta of footnote 59, however, when he argued against the requirement of an anticompetitive effect. In *Container*, written almost thirty years later, he eagerly concluded, based on flimsy evidence at best, that the price exchanges at issue did affect price. Thus, one can conclude that Douglas was our staunchest defender of the sanctity of the price mechanism. One can as well conclude that his defense was, on occasion, overzealous.

## V. MONOPOLIZATION

Justice Douglas stridently believed that big is bad. In his scorching dissent in *United States v. Columbia Steel Co.*, which according to Douglas was "the most important antitrust case . . . before the Court in years,"<sup>187</sup> he rather succinctly set forth his views about economic power in private hands:

We have here the problem of bigness. Its lesson should by now have been burned into our memory by Brandeis. *The Curse of Bigness* shows how size can become a menace—both industrial and social. It can be an industrial menace because it creates gross inequalities against existing or putative competitors. It can be a social menace—because of its control of prices . . . power that controls the economy should be in the hands of elected representatives of the people, not in the hands of an industrial oligarchy. Industrial power should be decentralized. It should be scattered into many hands so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional

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<sup>184</sup>*Container*, 393 U.S. at 337.

<sup>185</sup>*See, e.g., White Motor Co. v. United States*, 372 U.S. 253, 262 (1963). More contemporary price fixing "characterization" cases have employed increasingly sophisticated analyses, such as the "quick look" rule of reason, to ascertain the likely competitive effect of horizontal collaborative conduct. *See, e.g., Cal. Dental Ass'n v. FTC*, 526 U.S. 756 (1999); *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85 (1984); *Ariz. v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979).

<sup>186</sup>*See supra* notes 149-62 and accompanying text.

<sup>187</sup>*United States v. Columbia Steel Co.*, 334 U.S. 495, 534 (1948) (Douglas, J., dissenting).

stability of a few self-appointed men. The fact that they are not vicious men but respectable and social-minded is irrelevant. That is the philosophy and the command of the Sherman Act. It is founded on a theory of hostility to the concentration in private hands of power so great that only a government of the people should have it.<sup>188</sup>

At least one does not have to long ponder what Douglas would have thought of Microsoft and Bill Gates.

*Columbia Steel* turned out to be the leading and most controversial merger case of the 1940s. There the government challenged an acquisition by Columbia Steel, a wholly owned U.S. Steel subsidiary of Consolidated Steel, a competitor in the fabricated steel market.<sup>189</sup> Columbia, the largest steel fabricator in the country, controlled thirteen percent of the growing western market while Consolidated had eleven percent of the same market.<sup>190</sup> In addition, the acquisition foreclosed U.S. Steel's competitors of rolled steel, a raw material needed by steel fabricators, from selling to Consolidated.<sup>191</sup>

Columbia Steel acquired the assets of Consolidated, forcing the government to sue under Sections 1 and 2 of the Sherman Act,<sup>192</sup> since the less permissive Section 7 of the Clayton Act then applied only to stock purchases with horizontal competitive effects.<sup>193</sup> The Court, by a narrow 5-4 majority, held that the government had not established that the acquisition amounted to an unreasonable restraint of trade<sup>194</sup> or an attempt to monopolize the fabricated steel market.<sup>195</sup> Justice Douglas' dissent, joined by Justices Black, Murphy and Rutledge, focused on the vertical rather than the horizontal aspects of the merger.<sup>196</sup> As he saw it, U.S. Steel had one-third of the country's rolled steel production and, in purchasing Consolidated, had effectively cut off thirteen percent of the "plates and shapes" market from competitors.<sup>197</sup> He ended

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<sup>188</sup>*Id.* at 535-36.

<sup>189</sup>*Id.* at 498 (majority opinion).

<sup>190</sup>*Id.* at 512.

<sup>191</sup>*Id.* at 507.

<sup>192</sup>*Columbia Steel Co.*, 334 U.S. at 498 (majority opinion).

<sup>193</sup>*Id.* at 508 n.8.

<sup>194</sup>*Id.* at 530-31.

<sup>195</sup>*Id.* at 533-34.

<sup>196</sup>*Id.* at 539 (Douglas, J., dissenting).

<sup>197</sup>*Id.* at 538-40. Consolidated's purchases of rolled steel generally amounted to three percent of that market. According to Justice Douglas, "[b]y no standard . . . can that

with his "big is bad" theme, stating "[t]he least I can say is that a company that has that tremendous leverage on our economy is big enough."<sup>198</sup>

Public and congressional sentiment seemed to be with Douglas. Congress soon passed the Celler-Kefauver Act, extending Section 7 of the Clayton Act to asset acquisitions as well as vertical mergers.<sup>199</sup>

Justice Douglas did not mellow with respect to his distaste for large companies or anything that could be characterized as market concentration. Twenty-five years after *Columbia Steel*, near the end of his long service on the Court, he wrote a scathing concurrence in *United States v. Falstaff Brewing Corp.*, a merger case involving the acquisition by the country's fourth largest brewery of the largest brewery in New England.<sup>200</sup> Douglas again quoted Brandeis, this time for the proposition that increased business size creates not efficiencies, but *inefficiencies* that simply allow the owner to garner more profits by increasing volume.<sup>201</sup>

Justice Douglas went on to lament that the increasing concentration of economic power into large corporations was transferring local control of business "to distant cities where men on the 54th floor with only balance sheets and profit and loss statements before them decide the fate of communities with which they have little or no relationship."<sup>202</sup> According to Douglas, two of the purposes of the 1950 Celler-Kefauver Act were to retain local control over industry and protect small businesses, goals which had "been largely defeated with serious consequences."<sup>203</sup>

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percentage be deemed immaterial." *Id.* at 538. He believed, however, that "[a] surer test of the impact of the acquisition on competition is to be determined not only by consideration of the actual markets reached by Consolidated but also by the actual purchases it makes," hence his emphasis on "plates and shapes." *Id.*

<sup>198</sup>*Id.* at 540. To support his statement, Justice Douglas quoted a 1940 monograph characterizing U.S. Steel as "the giant of the industry" with greater capacity than all the German producers combined and more than twice the capacity of Great Britain and France, respectively. *Id.* at 540 n.6 (quoting CLAIR WILCOX, COMPETITION AND MONOPOLY IN AMERICAN INDUSTRY, MONOGRAPH 21, at 120 (Comm. Print 1940)). See also Page, *supra* note 33, at 24-25.

<sup>199</sup>Celler-Kefauver Act, ch. 1184, 64 Stat. 1125 (1950) (current version at 15 U.S.C. §§ 18, 21 (2000)). For a review of the legislative history of the act, see *Brown Shoe Co. v. United States*, 370 U.S. 294, 311-23 (1962).

<sup>200</sup>*United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 539 (1973) (Douglas, J., concurring in part).

<sup>201</sup>*Id.* at 540-41 (quoting *Control of Corporations, Persons, and Firms Engaged in Interstate Commerce: Hearings on S. 98 Before the S. Comm. on Interstate Commerce*, 62 Cong. 1155 (1912) (statement of Louis D. Brandeis, Attorney at Law)).

<sup>202</sup>*Id.* at 541-42.

<sup>203</sup>*Id.* at 542-43.



The result, the Justice wrote, was that local employment suffers, local payrolls are reduced, and “responsible entrepreneurs in counties and States are replaced by clerks.”<sup>204</sup> He believed that “[a] nation of clerks is anathema to the American antitrust dream” and, if unabated, “leads predictably to socialism.”<sup>205</sup>

The *Columbia Steel* case was announced on June 7, 1948. About one month earlier on May 3, 1948, Justice Douglas tied an obscure record by issuing three majority antitrust opinions on the same day.<sup>206</sup> All involved the motion picture industry: *United States v. Griffith*,<sup>207</sup> *Schine Chain Theatres, Inc. v. United States*,<sup>208</sup> and *United States v. Paramount Pictures, Inc.*<sup>209</sup> *Griffith* involved monopoly leveraging rather than a market foreclosure through acquisition. Douglas succeeded in attracting a 6-1 majority, with Justices Murphy (who joined the dissent in *Columbia Steel*) and Jackson not participating, and Justice Frankfurter dissenting by substantially endorsing the district court opinion.<sup>210</sup>

While the *Griffith* decision is of doubtful validity today and is largely ignored as precedent, it did provide Justice Douglas with another ample opportunity to expound on his big is bad theory. In doing so, Douglas drafted language about exclusionary conduct by a monopolist that is still considered fundamental to establishing the requisite monopolistic intent necessary for a Section 2 violation.<sup>211</sup>

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<sup>204</sup>*Id.* at 543.

<sup>205</sup>*Id.*

<sup>206</sup>In 1898, Justice Rufus Wheeler Peckham also issued three majority antitrust opinions on the same day. See *Anderson v. United States*, 171 U.S. 604 (1898); *Hopkins v. United States*, 171 U.S. 578 (1898); *United States v. Joint Traffic Ass’n*, 171 U.S. 505 (1898). All three involved Sherman Act jurisdictional issues.

<sup>207</sup>*United States v. Griffith*, 334 U.S. 100 (1948).

<sup>208</sup>*Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110 (1948).

<sup>209</sup>*United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948). The 1947-48 Supreme Court Term was perhaps the busiest antitrust term ever. In addition to the four cases listed above, the Court also, in opinions written by Justice Black, decided *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), *FTC v. Cement Inst.*, 333 U.S. 683 (1948), *United States v. U.S. Gypsum Co.*, 333 U.S. 364 (1948) and *United States v. Line Material Co.*, 333 U.S. 287 (1948), for a total of eight antitrust cases.

<sup>210</sup>Justices Jackson and Frankfurter were with the majority in *United States v. Columbia Steel Co.*, 334 U.S. 495, 497 (1948).

<sup>211</sup>*Griffith*, 334 U.S. at 107. Supreme Court opinions sometimes are widely cited for an articulated legal principle even though the application of the principle to the facts before the Court is highly suspect. When this occurs, the case may often be cited as precedent for the principle articulated but ignored as precedent on the merits. An example is *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), one of the most criticized decisions of the Warren Court era. See, e.g., Robert H. Bork & Ward S. Bowman, Jr., *The Crisis in Antitrust*, 65 COLUM. L.

The case involved the use by a regional movie theater chain of its power in towns in which it had the sole theater to obtain favorable dates from distributors for films it desired in towns in which it faced competition from other theaters. As a consequence, competing movie theaters in the so-called open towns were allegedly prevented from being able to obtain enough first or second run films to operate successfully.<sup>212</sup>

Justice Douglas made short work of this fact pattern. He held that the use of one's monopoly position to gain a competitive advantage was all that was necessary to violate Section 2.<sup>213</sup> The standard set was that one has the power to exclude competitors "coupled with the purpose or intent to exercise that power."<sup>214</sup> Douglas' distrust of and distaste for big business, however, was apparent in the opinion and he arguably came close to establishing a no fault monopoly test when he stated that "[s]o it is that monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under [Section] 2 even though it remains unexercised."<sup>215</sup>

Thus, apparently the exercise of monopoly power is not required under Section 2 although proof of purpose or intent to exercise it is necessary.<sup>216</sup> While seemingly setting a fine line between acquiring or having monopoly power and using it, *Griffith* is consistent with the price fixing test in *Socony-Vacuum*, in which Justice Douglas held that the purpose to fix prices, even unaccompanied by an overt act, is all that is

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REV. 363 (1965); Thomas E. Kauper, *The "Warren Court" and the Antitrust Laws: Of Economics, Populism, and Cynicism*, 67 MICH. L. REV. 325 (1968). *Brown Shoe* is often cited for its analytical construct for analyzing mergers under Section 7 (defining relevant product and geographic markets and then measuring the competitive impact of the merger within the market), even though the Court's assessment of the competitive impact is more than a little suspect. Similarly, *Griffith* is oft cited for its articulation of exclusionary conduct as a means to establish intent to monopolize although its use as a legal precedent on its merits is questionable today. See, e.g., HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 317 (2d ed. 1999).

<sup>212</sup>*Griffith*, 334 U.S. at 103.

<sup>213</sup>*Id.* at 107.

<sup>214</sup>*Id.* This language gives rise to the two-prong test under Section 2, which requires proof of market power plus intent to monopolize.

<sup>215</sup>*Id.* To be fair, this language came in the context of his stating that one did not have to show an independent Section 1 conspiracy to prove the unlawful intent of a monopolist, but it nevertheless does seem to eradicate any meaningful intent standard.

<sup>216</sup>Justice Douglas acknowledges that "mere size is not outlawed by [Section] 2." *Id.* at 107 n.10. But he warned that size is "an earmark of monopoly power," *id.*, and "carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past." *Id.* (quoting *United States v. Swift & Co.*, 286 U.S. 106, 116 (1932)).

necessary for a per se violation of Section 1.<sup>217</sup> But while “specific intent” is not required,<sup>218</sup> a more general purpose or intent is, which can, practically speaking, only be discerned by looking to the conduct of the monopolist. Thus, Douglas concluded that “the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful.”<sup>219</sup>

Justice Douglas did therefore require some conduct, although it is not certain if the mere acquisition of monopoly power met the standard.<sup>220</sup> The power and purpose to exclude is what it comes to and that test has stood the test of time. *Griffith* and *Alcoa* are its forebears.

*Griffith* falters considerably, however, in the application of the articulated standard to the facts before it, as arguably does *Alcoa*. For Justice Douglas had no qualms about condemning the leveraging of market power in one market, the closed towns, to a second competitive market, the open towns.<sup>221</sup> First, it is not at all clear that the statutory language of Section 2 applies to monopoly leveraging where the second market does not result in a monopoly.<sup>222</sup> Even if it does, the lower courts are currently split about the economic and legal effect of monopoly leveraging on a second non-monopolistic market, with some fearing that the application Section 2

<sup>217</sup>*Socony-Vacuum*, 310 U.S. at 224 n.59. See *supra* text accompanying notes 117-19.

<sup>218</sup>*Griffith*, 334 U.S. at 105.

<sup>219</sup>*Id.* at 107. Thus, *Griffith* is seemingly in step with Judge Hand’s famous opinion in *United States v. Aluminum Co. of America*, 148 F.2d 416, 432 (2d Cir. 1945) (*Alcoa*) (“[N]o monopolist monopolizes unconscious of what he is doing.” *Griffith*, 334 U.S. at 105 (quoting *Alcoa*, 148 F.2d at 432)).

<sup>220</sup>He is again true to the *Alcoa* case, in which Judge Hand observed that “the origin of a monopoly may be critical in determining its legality . . . .” *Alcoa*, 148 F.2d at 429. Cf. CARL KAYSEN & DONALD F. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 111, 265-72 (1959) (arguing that excessive market power, without more, should be illegal).

<sup>221</sup>*Griffith*, 334 U.S. at 106-07. Justice Douglas made a similar point, in the context of vertical integration and thus leveraging by a monopolist in *Paramount Pictures*, 334 U.S. at 174, decided the same day as *Griffith*. Then, four years later, Justice Douglas and Black joined a four-justice dissent in *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 628 (1952) (Burton, J., dissenting), arguing that the majority “seeks to avoid the effect of *United States v. Griffith* . . . .” The majority had reversed a lower court judgment for the government in a newspaper tying/monopolization case. According to the dissent, the *Times-Picayune*’s use of its monopoly power in the morning newspaper market in New Orleans with advertisers to gain a competitive advantage over a rival newspaper in the evening newspaper market violated the Sherman Act. *Id.*

<sup>222</sup>See, e.g., *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 203-06 (3d Cir. 1992), cert. denied, 507 U.S. 921 (1993). See also 3 PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 652 (2d ed. 2002).

might unduly penalize “efficient and natural” monopolies.<sup>223</sup> The Supreme Court itself seems to have vacillated on the issue,<sup>224</sup> although the recent *Trinko* decision casts further doubt on the unlawfulness of monopoly leveraging.<sup>225</sup>

Thus, with the help of 20-20 hindsight, the *Griffith* decision appears shaky in its application of the law to its facts, although, at least as now generally interpreted, the case stands for the now fundamental proposition that one does not have to show a separate Section 1 violation to prove an intent to monopolize under of Section 2.<sup>226</sup> In fact, Judge Wyzanski, in his influential opinion in *United States v. United Shoe Machinery Corp.*, believed that Justice Douglas may have gone further in *Griffith* and, following Judge Hand in *Alcoa*,<sup>227</sup> ruled that a monopolist “monopolizes”

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<sup>223</sup>See, e.g., *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 548 (9th Cir. 1991), *cert. denied*, 503 U.S. 977 (1992); *Fineman*, 980 F.2d at 205-06. See also *Lantec Inc. v. Novell Inc.*, 306 F.3d 1003, 1024 n.11 (10th Cir. 2002) (recognizing circuit split but refusing to decide issue); *Covad Comms. Co. v. BellSouth Corp.*, 299 F.3d 1272, 1285 (11th Cir. 2002) (recognizing leveraging claim); *Virgin Atl. Airways v. British Airways, Plc.*, 257 F.3d 256, 272 (2d Cir. 2001) (recognizing potential leveraging claim); *Eleven Line, Inc. v. N. Tex. State Soccer Ass’n*, 213 F.3d 198, 206 n.16 (5th Cir. 2000) (recognizing circuit split); *Kerasotes Mich. Theatres v. Nat’l Amusements*, 854 F.2d 135, 137 (6th Cir. 1988) (recognizing leveraging claim), *cert. dismissed*, 490 U.S. 1087 (1989); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir. 1979) (“[T]he use of monopoly power attained in one market to gain a competitive advantage in another is a violation of [Section] 2, even if there has not been an attempt to monopolize the second market.”), *cert. denied*, 444 U.S. 1093 (1980).

<sup>224</sup>*Compare* *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 479 n.29 (1992) (“[P]ower gained through some natural and legal advantage such as a patent, copyright, or business acumen can give rise to liability if ‘a seller exploits his dominant position in one market to expand his empire into the next.’”) (quoting *Times-Picayune*, 345 U.S. at 611), *with* *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993) (“[Section] 2 makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so.”).

<sup>225</sup>*Verizon Comms. Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 415 n.4 (2004) (noting that the Court of Appeals erred to the extent that it did not require “a ‘dangerous probability of success’ in monopolizing a second market . . .” (quoting *Spectrum Sports*, 506 U.S. at 459)).

<sup>226</sup>See, e.g., *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 342 (D. Mass. 1953) (“A more inclusive approach was adopted by Mr. Justice Douglas in . . . *Griffith*. He stated that to prove a violation of [Section] 2 it was not always necessary to show a violation of [Section] 1.” (citation omitted)).

<sup>227</sup>*United States v. Aluminum Co. of Am.*, 148 F.2d 416, 428 (2d Cir. 1945) (*Alcoa*).

whenever he does business, “apparently even if there is no showing that his business involves an exclusionary practice.”<sup>228</sup>

Justice Douglas also wrote the opinion in *Schine Chain Theatres, Inc. v. United States*, the companion case to *Griffith* decided the same day.<sup>229</sup> The case is largely forgotten today although it did involve, similar to *Griffith*, the leveraging of favorable film distribution and clearances by a chain of movie theaters of sixty closed towns into sixteen open or competitive towns.<sup>230</sup> Unlike *Griffith*, however, much of the defendant’s conduct in *Schine Chain Theatres* seemed to be directed toward maintaining or acquiring a monopoly as opposed to merely gaining a competitive advantage in another market.<sup>231</sup> As such, *Schine Chain Theatres* may not be as much of a pure leveraging case as its companion.

The opinion does reaffirm, in language more certain than in *Griffith*, that otherwise lawful conduct may, in the hands of a monopolist, establish intent to monopolize.<sup>232</sup> Otherwise, Douglas’ opinion simply repeats key language from *Griffith*<sup>233</sup> and adds little to his “big is bad” theme. In a ruling that would be in the mainstream today, he does hold that price cutting by a monopolist is not unlawful absent a “show[ing] that it was in purpose or effect employed as an instrument of monopoly power.”<sup>234</sup>

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<sup>228</sup>*United Shoe Mach. Corp.*, 110 F. Supp. at 342. The quoted language turned out to be dicta because Judge Wyzanski found ample evidence of exclusionary behavior by the defendant.

<sup>229</sup>334 U.S. 110 (1948). As in *Griffith*, Justices Jackson and Murphy did not participate. *Id.* at 130. Justice Frankfurter, however, concurred in the result although he had dissented in *Griffith*. *Id.*

<sup>230</sup>*Id.* at 113.

<sup>231</sup>*See, e.g., id.* at 119 (“[T]hese agreements were additional weapons in Schine’s arsenal of power through the use of which its monopoly was sought to be extended.”). *See also United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948), another majority opinion by Justice Douglas decided the same term. *Id.* at 140. In *Paramount Pictures*, Justice Douglas found that a conspiracy to monopolize the first run movie exhibition market was exclusionary in intent and effect and thus violated Section 2. *Id.* at 170.

<sup>232</sup>*See, e.g., Schine Chain Theatres*, 334 U.S. at 119 (“Even an otherwise lawful device may be used as a weapon in restraint of trade or in an effort to monopolize a part of trade or commerce.”). *See also id.* at 124 (“But any clearance so obtained, though otherwise reasonable, would be unlawful, for it would be the product of the exercise of monopoly power.”).

<sup>233</sup>“The mere existence of the power to monopolize, together with the purpose or intent to do so, constitutes an evil at which the Act is aimed.” *Id.* at 130.

<sup>234</sup>*Id.* at 120-21. Today, of course, a monopolist’s price cuts would have to meet the definition of predatory pricing to be considered unlawful conduct. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 221-27 (1993); *Cargill, Inc. v. Montfort*

It would be many years before Justice Douglas wrote another majority opinion in a Section 2 case, due in large part to the paucity of monopolization cases to come before the Court. He did write for the Court in the 1966 *United States v. Grinnell Corp.* decision, which is mostly known for its very suspect relevant market analysis.<sup>235</sup> Unfortunately, his conduct analysis is not any better. In the opinion, Justice Douglas made very short shrift of the conduct prong, relating that the defendant's actions in buying competitors, dividing services provided among the companies bought and controlled, setting price according to the amount of competition in a market, threatening retaliation against competitors, and the liberal use of broad covenants not to compete with officials of acquired companies "eliminated any possibility of an outbreak of competition."<sup>236</sup>

It is quite certain that Justice Douglas considered the *Grinnell* defendants to be "bad actors," concluding that the conduct analysis "presents no major problem here."<sup>237</sup> As a result, however, he spent only one paragraph of the opinion dealing with the issue. That paragraph is devoid of real analysis but is rather laced with conclusory statements, all of which could stand closer inspection.<sup>238</sup> It pales in comparison with the careful analysis of conduct issues in at least some modern Section 2 cases that determine whether a particular practice by a monopolist has an exclusionary effect on competitors and competition.<sup>239</sup>

As one commentator has noted, the *Grinnell* decision is symptomatic of the indeterminacy, vacuity, and conclusory nature of the Supreme Court's Section 2 conduct decisions that have given lower courts and businesses little guidance and left juries "to divine the metaphysical difference between" exclusionary conduct and competition on the merits.<sup>240</sup> It also illustrates the perils of the big is bad theory run

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of Colo., Inc., 479 U.S. 104, 117-22 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 595 (1986).

<sup>235</sup>*United States v. Grinnell Corp.*, 384 U.S. 563 (1966). See *infra* text accompanying note 303.

<sup>236</sup>*Grinnell*, 384 U.S. at 576.

<sup>237</sup>The full quotation is: "We shall see that this second ingredient presents no major problem here, as what was done in building the empire was done plainly and explicitly for a single purpose." *Id.* at 571.

<sup>238</sup>For example, Justice Douglas' condemnation of defendants meeting local competition by reducing rates would not be considered exclusionary today absent proof of predatory pricing. *Id.* at 570, 576.

<sup>239</sup>See, e.g., *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

<sup>240</sup>See, e.g., Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 255, 265-67 (2003).

amuck. If that is the Court's normative theory, a result-oriented conduct prong is perhaps to be expected.<sup>241</sup>

Equally problematic in *Grinnell* is that Justice Douglas announced the commonly understood test for conduct, derived from *Alcoa*,<sup>242</sup> and then seemed to retreat from it. That is, he defined the conduct element as "the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."<sup>243</sup> Since willfulness can certainly attach itself to developing a superior product or using business acumen, whatever that means, to gain market share, the two concepts are not mutually exclusive.<sup>244</sup> One plausible interpretation of the language is that development of a superior product or use of business acumen that resulted in monopoly power would spare the monopolist from a finding of exclusionary conduct. That, however, was not Douglas' reading in *Grinnell*. In a footnote he found that, based on defendants' conduct, "since . . . this monopoly power was consciously acquired, we have no reason to reach" whether "the burden is on the defendants to show that their dominance is due to skill, acumen, and the like."<sup>245</sup> In other words, a finding of monopoly power consciously acquired trumps any consideration of the superior product, skill or acumen defense rather than the other way round.

Not surprisingly, Justice Douglas' attitude toward monopoly leveraging did not change in his later years on the Court. In *Otter Tail v. United States*, the government challenged a public utility's refusal to sell or "wheel" electric power to municipalities wishing to replace Otter Tail as their retail electricity provider.<sup>246</sup> Otter Tail, a vertically integrated power company, produced electricity, transmitted it over its own lines, "wheeled" electricity produced by others over its lines, and sold power both at wholesale and retail in the Dakotas and Minnesota.<sup>247</sup>

In a 4-3 opinion with Justices Blackmun and Powell not participating, Justice Douglas quickly ruled that Otter Tail had run afoul of Section 2 by using its monopoly power as the dominant electric power source in the area "to foreclose potential entrants into the retail area from obtaining electric power from outside

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<sup>241</sup>That is, if the emphasis is on the supposed evil of monopoly power, the standard for establishing exclusionary conduct lessens and may be almost superfluous.

<sup>242</sup>*Alcoa*, 148 F.2d at 430.

<sup>243</sup>*Grinnell*, 384 U.S. at 570-71.

<sup>244</sup>See Elhauge, *supra* note 240, at 261.

<sup>245</sup>*Grinnell*, 384 U.S. at 576 n.7.

<sup>246</sup>*Otter Tail Power Co. v. United States*, 410 U.S. 366, 368 (1973).

<sup>247</sup>*Id.* Otter Tail was the retail electric power supplier for 465 towns in Minnesota, North Dakota and South Dakota. *Id.* at 368.

sources of supply.”<sup>248</sup> Otter Tail attempted to assert that its wheeling contracts with the Bureau of Reclamation and certain electrical cooperatives relieved it of any obligation to wheel to certain municipalities. Far from a defense, however, Douglas viewed the contracts as nothing more than territorial restrictions among potential competitors.<sup>249</sup>

Justice Stewart’s dissent, joined by Chief Justice Burger and Justice Rehnquist, noted that a monopoly resulted regardless of whether Otter Tail agreed to provide wholesale power to municipalities desiring their own retail system.<sup>250</sup> He noted that Otter Tail had invested significant resources in constructing power lines throughout the region.<sup>251</sup> Further, he expressed serious doubt about whether the threat of losing business could never be a legitimate business justification for a monopolist’s refusal to deal with a competitor, as the district court had asserted.<sup>252</sup>

Justice Douglas’ *Otter Tail* opinion lacks clarity and it is difficult to determine just what the case stands for.<sup>253</sup> It appears to require that a monopolist deal with a competitor, even if the result is that the competitor will displace the monopolist with its own monopoly. Perhaps, one might argue, such an extension of Section 2 should be limited to regulated industries with natural monopolies, but the *Otter Tail* Court imposed no such limits. Further, the decision seems to be quite close to a modern “essential facilities” case, although the Supreme Court has purposefully avoided recognizing the validity of the essential facilities doctrine.<sup>254</sup>

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<sup>248</sup>*Id.* at 377. Otter Tail had also “sponsored” litigation to delay the efforts of four towns to establish municipal systems. *Id.* at 372.

<sup>249</sup>*Id.* at 378-79.

<sup>250</sup>*Id.* at 388-89 (Stewart, J., dissenting).

<sup>251</sup>*Id.* at 382.

<sup>252</sup>*Id.* at 389-90. Justice Stewart’s principal arguments were that Otter Tail was due an implied immunity from the antitrust laws due to the extensive Congressional regulation of the power industry under the Federal Power Act of 1935 or, at a minimum, the doctrine of primary jurisdiction should have deferred the adjudication of antitrust issues to the Federal Power Commission. *Id.* at 390-91.

<sup>253</sup>For a critical view, see G.E. Hale & Rosemary D. Hale, *The Otter Tail Power Case: Regulation by Commission or Antitrust Laws*, 1973 SUP. CT. REV. 99. For a positive view of the result in *Otter Tail*, see ROSS, *supra* note 106, at 79-80. Professor Ross views *Otter Tail* as a vertical integration case in which the utility’s integration into retail increased its monopoly profit opportunities since it was otherwise regulated by the Federal Power Commission. *Id.* Since ninety percent of Otter Tail’s income derived from its sale of power at retail, 410 U.S. at 387 (Stewart, J., dissenting), Ross may be correct. In any event, his analysis is much more detailed than the general language of Justice Douglas’ opinion in *Otter Tail*.

<sup>254</sup>*See* Verizon Comms., Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 410-11 (2004); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 611 n.44 (1985).



Although lower federal courts have struggled with the breadth of *Otter Tail*, today's Supreme Court has shown an inclination to reel it in. In *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, the Court took pains to distinguish *Otter Tail*, ruling that since the facts before it did not require that the defendant share services already marketed, *Otter Tail* did not apply.<sup>255</sup> As a result, the defendant's alleged reluctance to allow interconnections with its local telephone network as required by Congress did not a Section 2 allegation make. The *Trinko* Court also displayed a good deal of hostility to the essential facilities doctrine with which *Otter Tail* is often associated, finding "no need either to recognize it or to repudiate [the doctrine] here."<sup>256</sup>

In the Section 2 context, Justice Douglas' "big is bad" predilections necessarily took center stage. While he reaffirmed the two prong test for proof of monopolization, his application of the conduct prong lacked content and came close to a no conduct standard. In short, Douglas' (and the Supreme Court's) lack of economic analysis and the conclusory approach tended to trivialize and minimize exclusionary conduct as a legitimate antitrust standard. The focus was on the manner in which the monopolist competed rather than on whether the monopolist's actions excluded competitors through use of its market power. Unfair tactics were presumed to be anticompetitive.<sup>257</sup>

The pendulum has swung in recent years to a heightened standard for labeling conduct as exclusionary, largely because of recognition that the indeterminacy of

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*Compare* United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912) with Associated Press v. United States, 326 U.S. 1 (1945). Some circuits have recognized the validity of the doctrine. See, e.g., Bellsouth Adver. v. Donnelley Info. Publ'g, 719 F. Supp. 1551 (S.D. Fla. 1988), *rev'd on other grounds*, 999 F.2d 1436 (11th Cir. 1993); MCI Comms. Corp. v. AT&T, 708 F.2d 1081 (7th Cir. 1983); Byars v. Bluff City News Co., 609 F.2d 843 (6th Cir. 1979); Hecht v. Pro-Football Inc., 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978).

<sup>255</sup>*Trinko*, 540 U.S. 398, 410. The *Trinko* Court's distinction of *Otter Tail* is questionable. It involved the alleged failure of Verizon, a local telephone exchange carrier, to share its local network with competitors as required by the Telecommunications Act of 1996. The Court pointed to a new "wholesale market for leasing network elements" to distinguish *Otter Tail*, which "was already in the business of providing a service to certain customers . . . and refused to provide the same service to certain other customers." *Id.* In fact, the issue in both cases was quite similar: the requirement that a monopolist cooperate with competitors to displace itself, at least partially. The purpose of the Telecommunications Act of 1996 was to provide local telephone customers with competition, not to create a wholesale leasing market.

<sup>256</sup>Since the 1996 Telecommunications Act granted competitors access to the defendant's local exchange network, the Court thought "it unnecessary to impose a judicial doctrine of forced access." *Id.* at 411.

<sup>257</sup>*Cf.* Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225 (1993) ("Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition . . .").

older exclusionary conduct test may have the affect of chilling desirable, pro-competitive market conduct.<sup>258</sup> Further, there is today recognition that it “is sometimes difficult to distinguish robust competition from conduct with long-term anticompetitive effects.”<sup>259</sup> Thus, if big is not necessarily bad, the paradigm has shifted dramatically and the modern federal judiciary, faced with trying to distinguish exclusionary from desirable, pro-competitive conduct, is without a normative model with any substantive content. Justice Douglas’ Section 2 jurisprudence, unfortunately, is largely to blame.

#### VI. THE PATENT/ANTITRUST INTERSECTION

Justice Douglas was also quite distrustful of the monopoly power granted a patent holder and favored a quite restrictive view of the patent holders rights. Here, as elsewhere, his concern was with the effect of the patent monopoly on small businesses. Early in his tenure, Douglas was in the mainstream of the New Deal Court in limiting the scope of the patent privilege. He voted with a unanimous Court in *Ethyl Gasoline Corp. v. United States*,<sup>260</sup> which outlawed a scheme of patent holders fixing resale prices of their product throughout the country. Then, two years later Douglas voted with a still-united Court in three patent-antitrust cases, writing the opinion in *United States v. Masonite Corp.*<sup>261</sup> There the Court found unlawful price fixing arising from a patent holder’s uniform licensing agreements to so-called *del credere* agents authorized to sell the patented product. Douglas wrote that “[s]ince patents are privileges restrictive of a free economy,” the rights of patent holders “must be strictly construed . . . .”<sup>262</sup>

The post-War Court, however, did not go far enough in restricting the use of patents as price fixing vehicles to suit Justice Douglas. In dissenting in *United States v. National Lead Co.*,<sup>263</sup> he took issue with the majority’s requirement that a patent holder who had engaged in an international cartel to divide and dominate the market

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<sup>258</sup>See, e.g., *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007); *Brooke Group, Ltd.*, 509 U.S. at 226 (1993); *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 122 n.17 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986).

<sup>259</sup>See *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458-59 (1993); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 67-68 (1984).

<sup>260</sup>309 U.S. 436 (1940). Justices McReynolds and Roberts did not participate. *Id.* at 461.

<sup>261</sup>316 U.S. 265, 267 (1942). See *Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488 (1942) and *B.B. Chemical Co. v. Ellis*, 314 U.S. 495 (1942), in which the Court struck down patent licenses under which patented machines were furnished only on the condition that the licensor’s own unpatentable product be used exclusively in them.

<sup>262</sup>*Masonite Corp.*, 316 U.S. at 280.

<sup>263</sup>332 U.S. 319, 364 (1947) (Douglas, J., dissenting in part).

for titanium pigment be required to grant non-exclusive licenses at uniformly reasonable rates. That was not enough for Douglas, who argued that the defendant should be required to issue licenses free of any royalty charge because “strong measures” were needed “to provide the maximum opportunity for new ventures to compete with the established giants of the industry.”<sup>264</sup> According to Douglas, if National Lead, the world’s leading producer of titanium pigments, would be at a competitive disadvantage because of reasonable royalty rates, “what can be the probable fate of newcomers or existing independents of small stature?”<sup>265</sup>

Similarly, Justice Douglas did not believe that the majority went far enough in *United States v. Line Materials Co.*<sup>266</sup> in striking down the cross-licensing of patents as a vehicle to fix prices in the sale of patented goods. Although the decision surely limited any interpretation of the landmark *United States v. General Electric Co.* decision,<sup>267</sup> which would permit patent licenses to fix competitors’ resale prices,<sup>268</sup> Douglas authored a concurring opinion, arguing that the Court should simply overrule *General Electric*.<sup>269</sup> That opinion countenanced at least some price fixing by patent holders and thus was, according to Douglas, in conflict with the constitutional protection of inventors and Congress’s “faithful” legislation of that protection.<sup>270</sup>

Justice Douglas also took issue with the majority in *Automatic Radio Manufacturing Company, Inc. v. Hazeltine Research, Inc.*<sup>271</sup> There the Court

<sup>264</sup>*Id.* at 367-68. See also Epstein, *supra* note 63, at 557-58.

<sup>265</sup>*National Lead Co.*, 332 U.S. at 368 (footnote omitted). Justice Douglas expressed similar sentiments for limiting the rights of copyright holders in his majority opinion in the government’s massive case against the movie industry, *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948) (“The copyright law, like the patent statutes, makes reward to the owner a secondary consideration.”). See also *supra* text accompanying notes 153-59 discussing his concurrence in *United States v. Line Material Co.*, 333 U.S. 287, 315 (1948).

<sup>266</sup>333 U.S. 287 (1948).

<sup>267</sup>272 U.S. 476 (1926).

<sup>268</sup>See, e.g., Note, *Price Fixing Through Patent Licensing—A Bastion is Undermined*, 61 HARV. L. REV. 1427, 1434 (1948); and Note, *Legality of Plural Restrictive Licensing*, 43 ILL. L. REV. 400, 409 (1948).

<sup>269</sup>*Line Materials Co.*, 333 U.S. at 315-16 (Douglas, J., concurring). Justices Black, Murphy and Rutledge joined the concurring opinion. *Id.*

<sup>270</sup>*Id.* at 316-21. Justice Burton, joined by Chief Justice Vinson and Justice Frankfurter, dissented. *Id.* at 321 (Burton, J., dissenting). Ironically, Justice Burton argued that the scheme that the majority had outlawed was essential to the ability of small patent holders to compete with giant patent holders like General Electric. *Id.* at 351.

<sup>271</sup>339 U.S. 827 (1950), overruled by *Lear, Inc. v. Adkins*, 395 U.S. 653 (1969).

allowed a patent licensing provision requiring royalty payments of a percentage of sales of patented and unpatented goods. Douglas' dissent characterized the case as one in which the patent holder "bludgeon[s]" his way into a partnership with the licensee. "A plainer extension of a patent by unlawful means would be hard to imagine."<sup>272</sup> He also took issue with the majority's ruling that a patent licensee was estopped to challenge the validity of the patent, arguing that "protection of the public interest in free enterprise [was] above reward to the patentee."<sup>273</sup>

Justice Douglas did vote with the majority in the *International Salt v. United States*<sup>274</sup> and *United States v. Lowe's Inc.*,<sup>275</sup> cases holding that market power is presumed when a patented or copyrighted product is at issue. Quite recently, however, in *Illinois Tool Works Inc. v. Independent Ink, Inc.*,<sup>276</sup> the Supreme Court reversed itself and removed the presumption of market power in tying cases involving patents. The *Illinois Tool Works* decision is in keeping with the Court's evolving view that tying arrangements are not generally anticompetitive<sup>277</sup> and in recognition of Congress' 1988 amendment to the Patent Code that removed the market power presumption from patent misuse cases.<sup>278</sup> It also represents in large part the antithesis of Douglas' views about patents and market power.

Increasingly, contemporary antitrust views big as not necessarily bad, even though some competitors may be harmed. *Illinois Tool Works* is in the same vein because market power must now be proved, not presumed. Justice Douglas, with his skepticism about the patent monopoly generally and distrust of anything smacking of market power, would surely disagree.

#### VII. RELEVANT MARKET ISSUES

Defining the relevant product and geographic market is of course a predicate to determining if a market is in fact concentrated and thus suffers from "the curse of bigness." Justice Douglas' approach to relevant market definition, no doubt colored by his abhorrence to any suggestion of economic power, can perhaps best be described as slippery. For example, in the *Rome Cable* case,<sup>279</sup> Douglas wrote a brief

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<sup>272</sup>*Id.* at 836, 838 (Douglas, J., dissenting).

<sup>273</sup>*Id.* at 839.

<sup>274</sup>332 U.S. 392 (1947).

<sup>275</sup>371 U.S. 38, 46 (1962).

<sup>276</sup>524 U.S. 28 (2006).

<sup>277</sup>*See* *Jefferson Parish Hosp. v. Hyde*, 466 U.S. 2 (1984); *U.S. Steel Corp. v. Fortner Enters.*, 429 U.S. 610 (1977).

<sup>278</sup>35 U.S.C. § 271(d)(5) (1988); 102 STAT. 4674 (1988).

<sup>279</sup>*United States v. Aluminum Co. of Am. (Rome Cable)*, 377 U.S. 271 (1964).

majority opinion for the Court and through tortured reasoning held unlawful the acquisition by Alcoa, primarily an aluminum wire and aluminum conductor producer, of Rome Cable, which was mostly a copper wire and copper conductor manufacturer. Douglas initially held that insulated aluminum conductor was a distinct submarket from copper conductor, overturning a district court finding to the contrary.<sup>280</sup> He then inexplicably concluded that both bare and insulated aluminum cable should be in the same submarket, since they both have the general function of carrying electricity, even though the government had not so argued.<sup>281</sup> To justify this seeming inconsistency and respond to Justice Stewart's dissent, Douglas lamely argued that the grouping of bare and insulated aluminum cable was "a logical extension" of the district court's findings that aluminum conductor and copper conductor generally constitute separate lines of commerce.<sup>282</sup>

Of course, Justice Douglas' distorted market definition was arguably nothing more than "gerrymandering" to find the market or submarkets necessary to establish unlawful concentration levels.<sup>283</sup> Since Alcoa produced no copper conductor, its inclusion in the relevant market would have diminished the market concentration to a level beyond the reach of Section 7.<sup>284</sup> It was apparently also necessary for the Court

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<sup>280</sup>*Id.* at 275-77.

<sup>281</sup>*Id.* at 276-77. *See also id.* at 286 (Stewart, J., dissenting). In the very next sentence, Justice Douglas noted that copper conductor and aluminum conductor also compete but separated the two because "each has developed distinctive end uses." *Id.* It is hard to fathom such logical inconsistency in a single paragraph in a Supreme Court opinion. *See, e.g.,* Kauper, *supra* note 211, at 339-40 (calling Douglas' inclusion of bare and insulated aluminum cable in one market in *Rome Cable* "astonishing" and labeling the market analysis there as "cast[ing] doubt on the entire definitional process"); LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* 624 (2d ed. 2006) ("[T]he Court acted on the irrational proposition that any combination of submarkets could also constitute a relevant product market.").

<sup>282</sup>*Rome Cable*, 377 U.S. at 277 n.4. Justice Stewart characterized Justice Douglas' grouping of the two kinds of aluminum cable as "repudiation of" the district court's findings since the facts established that unlike copper and aluminum cable, bare and insulated aluminum cable require "different equipment and engineering skills . . . for their manufacture and sale." *Id.* at 286 (Stewart, J., dissenting).

<sup>283</sup>*See* SULLIVAN & GRIMES, *supra* note 281, at 587.

<sup>284</sup>That same term, the Supreme Court arguably engaged in gerrymandering another relevant market definition when it lumped glass bottles and metal cans into one market and found the acquisition of the third largest manufacturer of glass containers by the second largest manufacturer of metal containers a violation of Section 7. *United States v. Cont'l Can Co.*, 378 U.S. 441 (1964). Justice Douglas voted with the majority in a 7-2 opinion. It would appear that the Court could have considered both *Rome Cable* and *Continental Can* to be conglomerate, rather than horizontal, cases. That designation would have obviated the Court's need to manipulate the relevant product market definition and would have enabled it to apply potential competition and entrenchment theories to strike down the mergers. At the time these

to group insulated and bare aluminum conductor together to gain a market concentration level that could support a Section 7 violation.<sup>285</sup>

Even with the relevant market manipulation, Rome Cable's 1.3% of the aluminum conductor market would appear to be *de minimus*. Not so for Justice Douglas, however. He believed that figure was sufficient to trigger a Section 7 violation since Alcoa with 27.8% of the gerrymandered relevant market was its leader.<sup>286</sup> According to Douglas, Rome Cable was "the prototype of the small independent that Congress aimed to preserve by Section 7."<sup>287</sup>

In *Rome Cable*, Justice Douglas' distaste for anything close to market concentration took center stage<sup>288</sup> and he took full advantage of the preventative language of the Clayton Act.<sup>289</sup> Two months earlier, he had written for the Court and struck down the acquisition of Pacific Northwest Pipeline by the El Paso Natural Gas Company.<sup>290</sup> El Paso was the sole out-of-state supplier of natural gas to California, a large, rapidly expanding market at the time.<sup>291</sup> Although Pacific Northwest had no pipeline into California, since it "was the only other significant pipeline west of the Rocky Mountains," Douglas believed "we would have to wear blinders not to see that the mere efforts of Pacific Northwest to get into the California market, though unsuccessful, had a powerful influence on El Paso's business attitudes within the State."<sup>292</sup>

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cases were decided, however, the Supreme Court had yet to apply those theories to Section 7 cases, with the exception of *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964) decided earlier the same term. *El Paso* involved a geographic rather than product extension merger, *see infra* text accompanying notes 401-10. The Court's (led by Justice Douglas) expansion of Section 7 to product extension mergers was still a few years away. *See infra* text accompanying notes 421-42.

<sup>285</sup>*See, e.g.*, SULLIVAN & GRIMES, *supra* note 281, at 624.

<sup>286</sup>*Rome Cable*, 377 U.S. at 280-81.

<sup>287</sup>*Id.* at 281. He characterized Rome Cable as "an aggressive competitor" and "a pioneer in aluminum insulation" with "a special aptitude and skill insulation, and an active and efficient research and sales organization." *Id.*

<sup>288</sup>"It would seem that the situation in the aluminum industry *may* be oligopolistic." *Id.* at 280 (emphasis added).

<sup>289</sup>For example, he quoted the legislative history of the Celler-Kefauver Act to show congressional intent to "prevent accretions of power which 'are individually so minute as to make it difficult to use the Sherman Act test against them,'" *Id.* (quoting S.Rep. No. 81-1775, at 5 (1950)).

<sup>290</sup>*United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964).

<sup>291</sup>*Id.* at 658.

<sup>292</sup>*Id.* at 658-59.

*El Paso Natural Gas* is thus the first occasion in which the Court focused on potential competition, as opposed to requiring an impact on actual competition, to invalidate a merger.<sup>293</sup>

Arguably the case is a strong one if, as Justice Douglas asserts, Pacific Northwest was the only potential competitor for the California natural gas market in an industry with very high entry barriers (the cost of natural gas pipeline construction).

While *El Paso Natural Gas* may be defensible, *Rome Cable* seems typical of Justice Douglas' and the Warren Court's seeming result-oriented manipulation of relevant market definitions. The most readily criticized along these lines is Douglas' opinion for the Court in *United States v. Grinnell Corp.*<sup>294</sup> There the government sued an aggressive, Microsoft-like company (in terms of its conduct) that provided accredited central station fire and burglary protection services to businesses, under Section 2 of the Sherman Act. Douglas found that the relevant product market was that of accredited central station protection services because "for many customers, only central station protection will do."<sup>295</sup> Then, however, after focusing on the customers' needs in defining the relevant product market, he inexplicably found the geographic market to be national, ignoring the reality that consumers of protection services choose from the options available locally.<sup>296</sup>

In economic terms, Justice Douglas shifted from demand side analysis for the product market to supply side analysis for the geographic market. He adopted, according to the famous line from Justice Fortas' vigorous dissent, a "strange red-haired, bearded, one-eyed man-with-a-limp classification."<sup>297</sup> If otherwise indefensible, Douglas seems to have at least been consistent on the geographic market definition issue in the oft-criticized *Von's Grocery* decision, joining with Justice Black's majority holding that Los Angeles constituted the relevant geographic market for retail grocery stores.<sup>298</sup> The major difference between *Grinnell* and *Von's Grocery* is that the latter is devoid of geographic market analysis and simply assumes that Los Angeles is the proper market.<sup>299</sup>

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<sup>293</sup>It was certainly not the last time, however. See, e.g., *United States v. Marine Bancorporation*, 418 U.S. 602 (1974); *United States v. Conn. Nat'l Bank, Inc.*, 418 U.S. 656 (1974); *United States v. Falstaff Brewing Co.*, 410 U.S. 526 (1973); *Ford Motor Co. v. United States*, 405 U.S. 562 (1972).

<sup>294</sup>384 U.S. 563 (1966). For criticism of *Grinnell*, see, e.g., Frank Easterbrook, *On Identifying Exclusionary Conduct*, 61 NOTRE DAME L. REV. 972, 973 n.2 (1986).

<sup>295</sup>*Grinnell*, 384 U.S. at 574.

<sup>296</sup>*Id.* at 575.

<sup>297</sup>*Id.* at 591 (Fortas, J., dissenting).

<sup>298</sup>*United States v. Von's Grocery Co.*, 384 U.S. 270 (1966). In his dissent, Justice Stewart pointed out that the actual market foreclosure of the merger was less than one percent of the total grocery store sales in Los Angeles since the two grocery chains were located in different parts of the Los Angeles metropolitan area. *Id.* at 296 (Stewart, J., dissenting). See also C. Paul Rogers, *Perspectives on Corporate Mergers and the Antitrust Laws*, 12 LOY. U. CHI. L.J. 301, 304-06 (1981).

<sup>299</sup>Later, in his dissent in the watershed *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974), Justice Douglas again applied a supply side analysis by focusing on the areas

On the other hand, Justice Douglas also voted with the majority in the infamous *Brown Shoe* decision, agreeing that the proper relevant geographic markets for retail shoe sales were each city with a population exceeding 10,000.<sup>300</sup> Although *Brown Shoe* involved retail goods rather than retail services, it is difficult to see how that makes any difference since the purchaser demand for both are decidedly local.<sup>301</sup> In *Grinnell*, Douglas argued that corporate planning is on a national level and that the certification and inspection of the systems was largely done by national insurers.<sup>302</sup> Justice Fortas' dissent forcefully dismembered that argument, noting that Supreme Court precedent and common sense required geographic markets to be defined by "where . . . a potential buyer look[s] for potential suppliers of the service . . ."<sup>303</sup>

Justice Douglas' narrowly defined relevant product market of accredited central station protection services in *Grinnell* also drew heavy fire from the separate dissents of Justices Fortas and Harlan.<sup>304</sup> Fortas, in particular, noted that the record established that customers frequently switch from one form of security system to another and that accredited central station services operated at a loss in at least twenty cities where alternatives such as watchmen, local alarm systems, proprietary systems and unaccredited central stations were available.<sup>305</sup> He noted the apparent

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in which the defendant coal companies sold their coal without a mention of from whom coal buyers looked to purchase coal. *Id.* at 511-27 (Douglas, J., dissenting).

<sup>300</sup>*Brown Shoe Co. v. United States*, 370 U.S. 294, 337-39 (1962). The decision is not infamous for its relevant market definition but for its finding that enhanced efficiencies from a merger support a finding of illegality because they tend to squeeze out "viable, small, locally owned business." *Id.* at 344. For criticisms see, for example, John L. Peterman, *The Brown Shoe Case*, 18 J. L. & ECON. 81 (1975), Kauper, *supra* note 211, Bork & Bowman, *supra* note 211, and Harlan Blake & Kenneth Jones, *Toward a Three-Dimensional Antitrust Policy*, 65 COLUM. L. REV. 422, 456-57 (1965).

<sup>301</sup>In the product market part of the *Grinnell* opinion, Justice Douglas makes a feeble attempt to differentiate products and services in distinguishing *Brown Shoe* but provides no analytical support. *Grinnell*, 384 U.S. at 572 ("First, we deal with services, not with products . . ."). Earlier, in *United States v. National Association of Real Estate Boards*, 339 U.S. 485, 490-91 (1950), Douglas had ruled that the prohibition against price fixing, at least, applied to services as well as to goods. See *supra* text accompanying notes 122-25.

<sup>302</sup>*Grinnell*, 384 U.S. at 575.

<sup>303</sup>*Id.* at 589 (Fortas, J., dissenting). Justice Fortas noted that "[t]he premises protected do not travel" and also that "[e]ven the central stations can provide service only within a 25-mile radius." *Id.* at 587-88. In general, he characterized the majority's relevant market analysis as "Procrustean—that it has tailored the market to the dimensions of the defendants." *Id.* at 590. Justice Fortas was a one-time student and former protégé of Justice Douglas at Yale and then the SEC. See, e.g., MURPHY, *supra* note 10, at 506-07. Although Justices Fortas and Douglas remained friends until Douglas' death in early 1980, *id.*, it is interesting to speculate about whether Fortas' strident dissent in *Grinnell* may have temporarily jeopardized their personal relationship. Perhaps the bond was strong enough that Justice Fortas felt free to use hyperbole in his dissent.

<sup>304</sup>See *Grinnell*, 384 U.S. at 585 (Fortas, J., dissenting); 384 U.S. at 583 (Harlan, J., dissenting).

<sup>305</sup>*Grinnell*, 384 U.S. at 592.



inconsistency with the Court's "reasonable interchangeability of use and cross-elasticity of demand" tests of earlier cases.<sup>306</sup>

Justice Douglas' relevant product market analysis in *Grinnell* is indeed difficult, if not impossible, to square with other Supreme Court precedent such as *United States v. E.I. du Pont de Nemours & Co.*, in which the Court ruled that cellophane was simply part of the overall flexible wrapping materials market even though cellophane was of greater quality and two to three times more expensive than the alternatives.<sup>307</sup> While Douglas may have had some difficulty following precedent, he did maintain internal consistency in *Grinnell* since he had joined Chief Justice Warren's dissent in the *DuPont* decision.<sup>308</sup> That dissent argued stridently that cellophane should be separated from the market because it was so superior that not only did DuPont not consider other flexible wrapping materials to be competitors but neither did the producers of those materials who priced their products independent of DuPont.<sup>309</sup>

Justice Douglas also voted for the narrower market division in the *International Boxing* case, joining the majority that determined that championship boxing matches were separate from non-championship prize fights.<sup>310</sup> Thus, he was in the three principal monopolization cases decided by the Warren Court, at least consistent in arguing for narrower relevant markets, the better to conclude that the defendant had the type of dominant market power needed for the Section 2 case to proceed.<sup>311</sup> Today *Grinnell* is still oft cited for establishing the two-prong test for monopolistic conduct<sup>312</sup> and thus joins the group of Warren Court antitrust decisions such as *Brown Shoe* and *Griffith* generally discredited for their holdings on the merits but

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<sup>306</sup>*Id.* at 592-93.

<sup>307</sup>*United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1951).

<sup>308</sup>*DuPont*, 351 U.S. at 414 (Warren, C.J., dissenting). Justice Black also joined the Warren dissent. *Id.*

<sup>309</sup>*Id.* at 417-19. According to the dissent, buyers considered cellophane to be a separate product as well. *Id.* at 417.

<sup>310</sup>*Int'l Boxing Club v. United States*, 358 U.S. 242 (1959).

<sup>311</sup>The relevant market analyses of *DuPont* and *Grinnell* are difficult at best to reconcile, leading some to conclude that the cases are simply result-oriented. *DuPont* seems to have been a relatively benign giant, obtaining their market dominance by development of a superior product while *Grinnell* was the opposite, buying up competitors and closing them down. Of course in today's more sophisticated Section 2 approach, *DuPont* might successfully defend against the unlawful conduct element. In *Grinnell*, the government apparently did not believe it could construct a strong Section 1 case; thus, the finding of monopoly power was necessary for success against a "bad actor" defendant. See, e.g., HANDLER, *supra* note 138, at 230-31 (suggesting that conduct evidence may influence market power analysis).

<sup>312</sup>"The offense of monopoly . . . has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Grinnell*, 384 U.S. at 570-71. See also Mark N. Berry, *The Uncertainty of Monopolistic Conduct: A Comparative Review of Three Jurisdictions*, 32 LAW & POL'Y INT'L BUS. 263, 274 (2001) ("[T]he Supreme Court in . . . *Grinnell* fashioned a general rule for monopolistic conduct that prevails to the current day.").

well recognized for their articulation of the applicable legal principle or analytical standard.<sup>313</sup>

Justice Douglas' majority opinion in *United States v. Greater Buffalo Press, Inc.* provides interesting insight about the flexibility he and the Warren Court believed that "the line of commerce" language of Section 7 of the Clayton Act gave the Court in defining relevant markets.<sup>314</sup> There the Court reversed a lower court finding that the printing of color comic supplements for newspapers that do not print their own was a separate market from the printing of color comic supplements for syndicates that sold copyrighted comic feature to newspapers.<sup>315</sup> Although recognizing that "submarkets within this broad market" may exist, Douglas reiterated that a submarket does not mean the Court must disregard the larger market.<sup>316</sup>

In *United States v. First National Bank and Trust Co. of Lexington*, Justice Douglas wrote for the majority in holding that commercial banking was "one relevant market,"<sup>317</sup> following the ruling in *Philadelphia National Bank* one year earlier that the "cluster of products . . . and services . . . denoted by the term 'commercial banking' . . . composes a distinct line of commerce."<sup>318</sup> Because he determined that the merger was illegal with the market so defined, he avoided deciding whether trust department services constituted another relevant market.<sup>319</sup>

A consistent thread seems to be present in Justice Douglas' view of relevant product issues, articulated in *Rome Cable*, in which he characterized price as "the single, most important, practical factor" in the insulated conductor market.<sup>320</sup> Earlier he had joined Chief Justice Warren's dissent in *DuPont*,<sup>321</sup> which argued that the much higher price of cellophane coupled with its physical superiority created a market separate from other flexible wrapping materials.<sup>322</sup> Similarly, the majority

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<sup>313</sup>See *supra* text accompanying note 217. See also sources cited *supra* note 277.

<sup>314</sup>402 U.S. 549 (1971).

<sup>315</sup>*Id.* at 552.

<sup>316</sup>*Id.* at 553. Here Justice Douglas quoted from *United States v. Phillipsburg National Bank & Trust Co.*, 399 U.S. 350, 360 (1970), which held that commercial banking was a line of commerce distinct from other types of financial institutions. *Id.*

<sup>317</sup>376 U.S. 665, 667 (1964).

<sup>318</sup>*United States v. Philadelphia Bank*, 374 U.S. 321, 356 (1963). See also *Phillipsburg National Bank*, 399 U.S. at 360. Justice Douglas was in the majority in both *Philadelphia National Bank* and *Phillipsburg National Bank*.

<sup>319</sup>For a further discussion of *First National Bank & Trust of Lexington*, see *infra* text accompanying notes 395-410.

<sup>320</sup>*United States v. Aluminum Co. of Am.*, 377 U.S. 271, 276 (1964) (distinguishing *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), which had focused on the style and quality of shoes in addition to price).

<sup>321</sup>*United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 414 (1956) (Warren, C.J., dissenting).

<sup>322</sup>The dissent was further troubled by the fact that seventy-five to eighty percent of all cigarettes were wrapped in with cellophane rather than other flexible wrapping materials, noting that all buyers of a product are entitled to competition. *Id.* at 424-25. Again there appears to be some consistency with Justice Douglas' relevant market definition in *Grinnell*

which he joined in *International Boxing Club of New York v. United States*<sup>323</sup> based its distinction of championship boxing matches from non-championship matches on the much higher revenue, increased television ratings and ticket prices, and greater television, radio and motion picture demand produced by championship fights.<sup>324</sup>

Certainly, effect on price is the key issue in contemporary relevant market analysis.<sup>325</sup> Recognition of the practical importance of price, however, does not necessarily translate to a cogent, consistent application of price theory. Justice Douglas, in fact, vacillated between supply and demand side analyses, even within a single decision. About the only real consistency one can find in his relevant market analysis is that he was sure to favor the definition of the narrowest plausible market, the better to find supposed market power and thus an antitrust violation. As his decision in *Rome Cable* illustrates, he was not even opposed to making it up as he went along, even if the government had not briefed it that way. In the hands of Douglas and the Warren Court, Section 7 of the Clayton Act (and, one might argue, Section 2 of the Sherman Act) was indeed a powerful tool to stop “in their incipency” increases in market share through merger.<sup>326</sup>

### VIII. DIVESTITURE

It is not surprising, given his antipathy towards monopoly power, that Justice Douglas’ favored structural remedies to behavioral ones. In essence, he believed divestiture was appropriate for any antitrust offense involving size or the accumulation of market power, whether accomplished collectively or independently. He was firm in his belief of divestiture as the antitrust remedy of choice and sought its use broadly, including cases involving vertical integration,<sup>327</sup> conspiracies to restrain trade,<sup>328</sup> abuse of patent rights in restraint of trade,<sup>329</sup> monopolization,<sup>330</sup> and

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when he notes “that for many customers, only central station protection will do.” *Grinnell*, 384 U.S. at 574.

<sup>323</sup>358 U.S. 242 (1959).

<sup>324</sup>*Id.* at 250-51.

<sup>325</sup>*See, e.g.*, DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES, §§ 1.0-1.322 (1992) (identifying a firm’s ability to maintain a “small but significant and nontransitory” increase in price as proof of market power).

<sup>326</sup>*See Brown Shoe Co. v. United States*, 370 U.S. 294, 317-18 & n.32 (1962) (quoting “incipiency” language and quoting legislative history).

<sup>327</sup>*Ford Motor Co. v. United States*, 405 U.S. 562, 573-74 (1972); *United States v. Paramount Pictures Inc.*, 334 U.S. 131, 173-75 (1948).

<sup>328</sup>*Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 600-01 (1951); *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110, 126-30 (1948); *United States v. Crescent Amusement Co.*, 323 U.S. 173, 188-90 (1944).

<sup>329</sup>*United States v. Nat’l Lead Co.*, 332 U.S. 319, 364-69 (1947) (Douglas, J., dissenting in part).

<sup>330</sup>*United States v. Grinnell Corp.*, 384 U.S. 563, 577-80 (1966); *Paramount Pictures*, 334 U.S. at 171-72; *Schine Chain Theatres*, 334 U.S. at 126-30; *United States v. Griffith*, 334 U.S. 100 (1948).

mergers.<sup>331</sup> In doing so, he made it clear that his interest was protecting competitors<sup>332</sup> and that his fear of size overcame any thought of efficiency or consumer welfare that, for example, vertical integration might achieve.<sup>333</sup>

Writing for the majority in *United States v. Crescent Amusement Co.*, Justice Douglas early on employed divestiture to deprive antitrust offenders of "the fruits" of their unlawful activity.<sup>334</sup> Thus, "[t]hose who violate the Act may not reap the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience."<sup>335</sup> He thought injunctive relief ineffective because it enabled defendants to "retain the full dividends of their monopolistic practices and profit from the unlawful restraints of trade which they had inflicted on competitors."<sup>336</sup> Surprisingly perhaps, this offensive use of divestiture broke new ground and served as the basis for the use of divestiture as a punitive as well as remedial remedy.<sup>337</sup>

Justice Douglas had no qualms about taking any opportunity to force a divestiture issue. In *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*,<sup>338</sup> Douglas was able to persuade a five-justice majority to remand and require divestiture in a case before the Court on a Rule 24(a) right of intervention question.<sup>339</sup> The case was a continuation of the *United States v. El Paso Natural Gas Co.* litigation in which Douglas, in a majority opinion for the Court, had three years before found El Paso in violation of Section 7 of the Clayton Act and directed the district court to order divestiture.<sup>340</sup> The district court had subsequently denied the intervention requests of the state of California and two private natural gas companies in the divestiture proceedings below. Although divestiture was not briefed or argued, as Justice Stewart's stinging dissent pointed out, that did not stop Justice Douglas from

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<sup>331</sup>*Ford Motor*, 405 U.S. at 573-74; *United States v. Greater Buffalo Press, Inc.*, 402 U.S. 549, 556 (1971); *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129, 136-43 (1967); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 662 (1964).

<sup>332</sup>*Schine Chain Theatres*, 334 U.S. at 128.

<sup>333</sup>*See, e.g., Paramount Pictures*, 334 U.S. at 174.

<sup>334</sup>323 U.S. 173, 189 (1944).

<sup>335</sup>*Id.*

<sup>336</sup>According to Justice Douglas, injunctive relief rendered enforcement of the Sherman Act "a futile thing" unless the Justice Department "moved in at the incipient stages of the unlawful project." *Schine Chain Theatres*, 334 U.S. at 128. Thus, divestiture or dissolution was "an essential feature" of enforcement decrees. *Id.*

<sup>337</sup>*See Note, Standards Governing Relief Under Section 4 of the Sherman Act*, 97 U. PA. L. REV. 234, 244 (1948). According to Justice Douglas, divestiture or dissolution served three functions: (1) terminating the combination or conspiracy when that was the violation; (2) depriving the defendants of the benefits of their conspiracy; and (3) breaking up or rendering powerless the monopoly power which the Sherman Act makes illegal. *Schine Chain Theatres*, 334 U.S. at 128-29.

<sup>338</sup>386 U.S. 129, 129 (1967).

<sup>339</sup>Justices White and Fortas did not participate and Justice Stewart, joined by Justice Harlan, dissented. *Id.* at 143 (Stewart, J., dissenting).

<sup>340</sup>376 U.S. 651, 662. *See infra* text accompanying notes 401-10.

"roam[ing] at large, unconfined by anything so mundane as a factual record developed in adversary proceedings."<sup>341</sup>

In point of fact, Justice Douglas was very unhappy with the district court's handling of the Court's broad divestiture order from the case's previous trip to the Supreme Court, and rather than requiring the parties to brief and argue the issue, simply undertook the issue on his own accord.<sup>342</sup> One could characterize the Justice's reaffirming of its divestiture order as the reassertion of judicial control over a remand seemingly gone astray or as an example of the judicial activism for which Douglas and the Warren Court were so noted. His *sua sponte* order that the district court judge be replaced is certainly an illustration of appellate court pique and concomitant activism.

Today divestiture is used much more sparingly than in the Warren Court heyday as skepticism about significant government intrusions into the economy has risen.<sup>343</sup> Even in monopolization cases, structural relief is unusual as recognition of efficiencies and other consumer benefits of size has grown.<sup>344</sup> Further, today high-tech markets change so quickly, and, in many cases, contain network effects necessary for consumer satisfaction, that the enforcement agencies have become leery of asking for structural relief.<sup>345</sup> Thus, both a change in markets through technological change and a dramatic shift in antitrust thinking have rendered Justice Douglas and the Warren Court's broad use of divestiture a remnant of antitrust history.

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<sup>341</sup>Justice Stewart characterized the majority as having "rushed headlong into a jurisprudential quagmire . . ." 386 U.S. at 160 (Stewart, J., dissenting). Justice Douglas was unhappy that the government had "knuckled under" to El Paso in agreeing to a proposed "settlement" of the case after remand. *Id.* at 129 (majority opinion). He responded by articulating in detail what the divestiture decree had to contain to assure that El Paso faced competition for the California natural gas market. *Id.* at 136-40.

<sup>342</sup>Douglas even took the extraordinary step of directing that a different district judge be assigned to hear the case on this remand, *id.* at 142-43, a move the dissent characterized as "not only unprecedented, but incredible[.]" since no one had requested his replacement at any stage. *Id.* at 161 (Stewart, J., dissenting).

<sup>343</sup>*See, e.g.*, RICHARD A. POSNER, *ANTITRUST LAW* 102 (2d ed. 2001). Judge Posner argues that structural relief "such as divestiture should be limited to the divestiture of assets recently acquired in an unlawful merger." *Id.* As a practical matter, that would effectively eliminate divestiture as a remedy since under the Hart-Scott-Rodino Pre-Merger Notification Act all mergers of significant size are reviewed by the government enforcement agencies prior to consummation.

<sup>344</sup>Judge Posner characterizes the so-called 1968 Neal Report (officially the White House Task Force Report on Antitrust Policy, reprinted in *Small Business and the Robinson Patman Act, Hearings before the Special Subcommittee of Small Business and the Robinson-Patman Act of the House Select Committee on Small Business*, 91st Cong. 291 (1969)), which urged that highly concentrated markets be forcibly deconcentrated through forms of structural relief such as divestiture (as well as new legislative solutions), as today "completely off the wall" even though its principal authors were at the time largely conservative. POSNER, *supra* note 343, at 117.

<sup>345</sup>*See, e.g.*, Thomas Piraino, *An Antitrust Remedy or Monopoly Leveraging by Electronic Networks*, 93 NW. U. L. REV. 1 (1998).

## IX. MERGERS AND ACQUISITIONS

The Warren Court came into full bloom in the 1960s, at least with respect to trade regulation issues, and decided a plethora of merger and acquisition cases under Section 7 of the Clayton Act.<sup>346</sup> In the face of contemporary criticism that "[t]he sole consistency that I can find is in litigation under Section 7, the Government always wins,"<sup>347</sup> Justice Douglas voted for the government in every case, frequently writing the majority opinion. In fact, the government did always win.

The watershed *General Dynamics* decision,<sup>348</sup> handed down only two years after *Ford Motor* and eight years after the horrific *Von's Grocery* decision,<sup>349</sup> vividly illustrates the impact that the Burger Court had on merger analysis and how left behind Justice Douglas and other Warren Court holdovers were by "the New Learning" and thinking about industrial concentration.<sup>350</sup> In the 1966 *Von's Grocery* case, Douglas joined his crony Justice Black in a 6-2 decision, with Justice White concurring, to strike down a merger between the third and sixth largest grocery chains in the Los Angeles area that together had a 7.5% market share, as measured in retail grocery sales.

Justice Stewart, joined only by Justice Harlan,<sup>351</sup> penned a blistering dissent, noting that the majority had blocked a merger resulting in 1.4% of the grocery stores in Los Angeles with a market increase of 1.1% of the two largest chains in the market and 3.3% of the six largest.<sup>352</sup> According to Stewart, even those meager

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<sup>346</sup>The merger wave of the late 1950s and early 1960s coupled with the passage of the Celler-Kefauver Act in 1950, which expanded Section 7 coverage to asset as well as stock acquisitions are at least partly responsible for the heightened merger enforcement activity. See Celler-Kefauver Act, ch. 1184, 64 Stat. 1125 (1950) (current version at 15 U.S.C. §§ 18, 21 (2000)). An aggressive Department of Justice and receptive Supreme Court are certainly other factors.

<sup>347</sup>*United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting). See also Kauper, *supra* note 211, at 335-41 (examining growing cynicism of the Supreme Court in antitrust cases where the government always wins).

<sup>348</sup>*United States v. Gen. Dynamics Corp.*, 415 U.S. 486 (1974).

<sup>349</sup>*Von's Grocery*, 384 U.S. 270.

<sup>350</sup>See, e.g., INDUSTRIAL CONCENTRATION: THE NEW LEARNING (HARVEY J. GOLDSCHMID et al. eds., 1974). At the time, *General Dynamics* was a controversial decision and drew substantial criticism from commentators. See James F. Ponsoldt, *The Expansion of Horizontal Merger Defenses After General Dynamics: A Suggested Reconsideration of Sherman Act Principles*, 12 LOY. U. CHI. L.J. 361, 362 (1981) (asserting that *General Dynamics* "dramatically changed horizontal merger litigation in favor of defendants"); Daniel F. Kolb, *The Impact of Business Realities in Recent Potential Competition and Horizontal Merger Cases—The Government Can Lose*, 47 ANTITRUST L.J. 955 (1978); Howard R. Lurie, *Mergers Under the Burger Court: An Anti-Antitrust Bias and Its Implications*, 23 VILL. L. REV. 213 (1978). Cf. Miles W. Kirkpatrick & Stephen Paul Mahinka, *The Supreme Court and the "New Economic Realism" of Section 7 of the Clayton Act*, 30 SW. L.J. 821 (1976); Richard A. Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282 (1975).

<sup>351</sup>Justice Fortas did not participate. *Von's Grocery*, 384 U.S. at 279.

<sup>352</sup>*Id.* at 281, 302 (Stewart, J., dissenting). In addition, Justice Stewart pointed out that the merger was really a market extension rather than horizontal acquisition because more than

statistics were misleading because the acquired firm, Shopping Bag, was on the decline with decreasing earnings and profits.<sup>353</sup> In addition, the lack of entry barriers and the ability of small grocery chains to enter and compete suggested that any increase in market share was not concomitant with an increase in market power.<sup>354</sup>

The Court continued routinely to steamroll any and all mergers after *Von's Grocery*<sup>355</sup> until 1974 when the Burger Court had taken firm root.<sup>356</sup> As a result, that year in *General Dynamics*, Justice Stewart was able to garner a 5-4 majority in upholding a merger of a deep shaft coal producer and a strip mine coal company competing in one of the four major coal distribution areas.<sup>357</sup> Douglas dissented and was joined by Warren Court holdovers Brennan, White and Marshall. In effect, the four Burger Court appointees joined Justice Stewart to allow the merger in *General Dynamics*, replacing three Warren Court votes to enjoin the acquisition in *Von's Grocery*.<sup>358</sup>

The majority opinion in *General Dynamics* is strikingly similar to Justice Stewart's dissent in *Von's Grocery*, as both opinions looked beyond statistical evidence of potential market foreclosures to consider other market factors such as the relative competitive strength of the acquired company. The *General Dynamics* Court noted that United, the acquired company, had very limited uncommitted coal

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fifty percent of the acquiring and acquired firms did not compete with each other for customers. As a result, he asserted that the total market foreclosed by the merger was less than one percent of the total grocery sales in the Los Angeles area. *Id.* at 296.

<sup>353</sup>*Id.* at 298.

<sup>354</sup>Justice Stewart noted that the advent of buying cooperatives enabled small chains to purchase goods at prices competitive with those paid by the large chains. *Id.* at 298-99. Ironically, four years later the Supreme Court, in another shaky decision in which Justice Douglas voted with the majority, applied the per se rule to the market allocation rules of just such a purchasing cooperative. *See United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972).

<sup>355</sup>*See United States v. Greater Buffalo Press, Inc.*, 402 U.S. 549 (1971) (Douglas majority opinion rejecting failing company defense, *see infra* text accompanying notes 365-67); *United States v. Phillipsburg Nat'l Bank & Trust Co.*, 399 U.S. 350 (bank merger struck down); *Citizen Publ'g Co. v. United States*, 394 U.S. 131 (1969) (Douglas majority opinion rejecting failing company defense, *see infra* text accompanying notes 351-62); *United States v. Third Nat'l Bank in Nashville*, 390 U.S. 171 (1968) (bank merger struck down); *United States v. First City Nat'l Bank of Houston*, 386 U.S. 361 (1967) (Douglas majority opinion holding that under the Bank Merger Act of 1966 a court has de novo review of proposed bank merger approved by the Comptroller of Currency).

<sup>356</sup>Warren Burger had replaced Earl Warren as Chief Justice. Justices Blackmun, Powell and Rehnquist had been appointed by President Nixon to replace Justices Fortas, Black and Harlan, respectively. Justice Marshall had joined the Warren Court as a President Johnson appointment subsequent to *Von's Grocery*, replacing Justice Clark.

<sup>357</sup>415 U.S. 486, 511-12 (1974).

<sup>358</sup>Justice Fortas had not participated in *Von's Grocery*. Justice Harlan had joined Justice Stewart's dissent there but had been replaced in 1967 by Johnson appointee Thurgood Marshall, who joined Justice Douglas' dissent in *General Dynamics*. Warren Court holdover Justice White had concurred in *Von's Grocery* but joined Justice Douglas' dissent in *General Dynamics*. *See generally* Rogers, *supra* note 298.

reserves with little hope for acquiring more.<sup>359</sup> Most coal was sold under long-term supply contracts to electric utilities, which demanded assurance of future supplies. Those were contracts for which United could not effectively bid. As a result, the Court found proof of United's past and present market position misleading because it did not reflect current competition for new long-term supply contracts.<sup>360</sup>

Justice Douglas' dissent, while superior to the majority opinion he joined in *Von's Grocery*,<sup>361</sup> did not tackle the majority's assessment of market impact head on. It was obviously drafted as a majority opinion as it focuses mostly on the supposed errors of the district court and not on the majority opinion.<sup>362</sup> In addressing the majority, Douglas argued the technical point that proof of United's weak reserve position constituted post-acquisition evidence not supported by the district court's time-of-acquisition findings.<sup>363</sup> The majority disagreed, noting that Section 7 of the Clayton Act dealt with "probabilities, not certainties" and that the district court was "fully justified" in relying on evidence of weak coal reserves because it directly bore on the question of whether a future lessening of competition was probable.<sup>364</sup>

In addressing the merits of the majority's weak reserve argument, Justice Douglas was reduced to arguing that United might in the future develop deep-mining expertise to remain a competitive factor, even though it had not extracted deep reserves in twenty years.<sup>365</sup> He also took issue with the district court's lack of finding of market shares at the time of acquisition of uncommitted coal reserves<sup>366</sup> and concluded that affirming the district court's judgment could only reflect "a deep-seated judicial bias against [Section] 7 of the Clayton Act."

There is no little irony there since the Supreme Court had not ruled against the Justice Department in a merger case since *Columbia Steel* twenty-six years before and then only because the case fell under Section 1 of the Sherman Act rather than Section 7 of the Clayton Act. As noted, Justice Douglas had vigorously dissented.<sup>367</sup>

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<sup>359</sup>United ranked fifth among Illinois coal producers in annual production but tenth in reserve holdings, controlling less than one percent of reserve holdings in Illinois, Indiana and Western Kentucky. United's reserves were so depleted that it had already closed several mines. *General Dynamics*, 415 U.S. at 502.

<sup>360</sup>*Id.* at 501-02.

<sup>361</sup>*Von's Grocery*, however, is probably the weakest, most poorly analyzed Supreme Court antitrust opinion on record.

<sup>362</sup>One wonders, who was the swing vote? Justices Blackmun and Powell would appear to be the most likely candidates based on their later voting records.

<sup>363</sup>*General Dynamics*, 415 U.S. at 523-24.

<sup>364</sup>*Id.* at 505 (quoting *Brown Shoe*, 370 U.S. at 323).

<sup>365</sup>*Id.* at 525. The majority responded by stating that "the hypothetical possibility that United Electric might in the future acquire the expertise to mine deep reserves proves nothing—or too much" since that theoretical possibility was available to all "with the inclination and the corporate treasury to do so." *Id.* at 509.

<sup>366</sup>*Id.* at 527. The majority had concluded that the government's prima facie statistical case did not establish the likelihood of a substantial lessening of competition in any market. *Id.* at 510-11.

<sup>367</sup>See *supra* text accompanying notes 179-85.



It is probably more accurate to say that Douglas held a deep-seated judicial bias *in favor* of Section 7 of the Clayton Act.

It is illuminating to consider *General Dynamics* and Warren Court decisions like *Von's Grocery* in the context of the Herfindahl-Hirschman Index, the present-day index the Department of Justice uses to assess the concentration of a given market and the likely competitive impact of a given merger, to illustrate just how out of step Justice Douglas and his Warren Court brethren have become.<sup>368</sup> *Von's Grocery*, for example, is not a case the government would today pursue and, in fact, probably would not get a second request under the Hart-Scott-Rodino Pre-Merger Notification Act.<sup>369</sup> The pre-merger index would likely have been under 300 with the increase from the merger at only about forty.<sup>370</sup> *General Dynamics* presented a similar picture, even before the lack of coal reserves was factored.<sup>371</sup> Nonetheless, Douglas used *Von's Grocery* and the even smaller market foreclosure in *United States v. Pabst Brewing Co.*<sup>372</sup> as benchmarks in his *General Dynamics* dissent.<sup>373</sup> Douglas did note that those were cases involving merging "trends," which, under Warren Court doctrine, allowed for more liberal application of Section 7.<sup>374</sup>

Consistent with his aggressive use of Section 7 to combat increased market concentration, Justice Douglas authored two opinions<sup>375</sup> late in his career in which he refused to apply the so-called "failing company" defense first recognized by the Court in *International Shoe Co. v. FTC.*<sup>376</sup> In the *Citizen Publishing* case, Douglas upheld a divestiture order for a joint operating agreement between the two daily newspapers in Tucson, Arizona. Although the agreement provided for the

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<sup>368</sup>See generally DEP'T of JUSTICE & FED. TRADE COMM'N HORIZONTAL MERGER GUIDELINES § 4 (1997).

<sup>369</sup>15 U.S.C. § 18(a) (2001).

<sup>370</sup>The Guidelines indicate that the government is unlikely to challenge a merger in a market with a post merger index of under 1000.

<sup>371</sup>See *General Dynamics*, 415 U.S. at 495 n.6 ("degree of concentration in two coal markets chosen by . . . [g]overnment were 'roughly comparable' to those in *Von's Grocery*").

<sup>372</sup>384 U.S. 546 (1966).

<sup>373</sup>The market foreclosure in *Von's Grocery* was 7.5% and in *Pabst Brewing* 4.49%. *Pabst Brewing* was another questionable Warren Court decision, written by Justice Black. Worried about industry trends, Justice Douglas concurred, appending an Art Buchwald *Washington Post* column to his opinion which, tongue in cheek, predicted that, due to slack antitrust enforcement, the United States would soon be down to one company and that one company would then attempt to purchase the United States. *General Dynamics*, 384 U.S. at 553.

<sup>374</sup>Justice Douglas also acknowledged that "uncommitted reserves or sales of previously uncommitted coal would be preferable indicia of competitive strength," but argued that the district court had made no such time of acquisition findings under either standard. *General Dynamics*, 415 U.S. at 485.

<sup>375</sup>See *Citizen Publ'g Co. v. United States*, 394 U.S. 131, 138; *United States v. Greater Buffalo Press, Inc.*, 402 U.S. 549 (1971).

<sup>376</sup>*Int'l Shoe Co. v. FTC*, 280 U.S. 291 (1930).

continuing independence of each paper's news and editorial departments, it combined circulation, advertising, subscription and other business operations.<sup>377</sup>

The defendant asserted the failing company defense since *The Citizen* had operated in the red for many years and sold fifty percent less advertising than its competitor, *The Star*. Justice Douglas quickly ruled that neither requirement for the defense—"the grave probability of a business failure" nor proof that *The Star* was the only available suitor for *The Citizen*—was present.<sup>378</sup> As a matter of policy, Douglas announced that the Court was "confin[ing] the failing company doctrine to its present narrow scope."<sup>379</sup>

In dissent, Justice Stewart expressed his belief that the majority was in effect further restricting the failing company defense by requiring the defendant to affirmatively show that it tried to sell to a non-competitor.<sup>380</sup> Stewart pointed out that the district court had before it "substantial" and "convincing evidence" that no outside suitor would have considered purchasing *The Citizen* because of its "dire financial condition."<sup>381</sup> According to Stewart, that was all the law required prior to the majority's new standard that failing company defendants "prove that they made tangible efforts, however futile, to find an outside buyer."<sup>382</sup>

In his majority opinion, Justice Douglas does not cite *International Shoe*, and quite rightly so, for the proposition that a failing company defendant must affirmatively establish that it was the only available purchaser. Although the *International Shoe* decision mentions parenthetically that the competitor purchaser should be the only "prospective purchaser," there is no evidence in that case that the distressed company had actually sought other suitors.<sup>383</sup> In fact, the Court there gave considerable deference to the good faith of the failing company's "officers, stockholders, and creditors, thoroughly familiar with the factors of a critical situation and more able than commission or court to foresee future contingencies, [who] after much consideration, felt compelled to choose the latter alternative."<sup>384</sup>

Justice Douglas did drop a "Cf." cite to *United States v. Diebold, Inc.*, a brief (one long paragraph) 1961 *per curiam* decision in which the Court reversed summary judgment for a failing company defendant.<sup>385</sup> According to the Court, one

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<sup>377</sup>*Citizen Publishing*, 394 U.S. at 133-34.

<sup>378</sup>*Id.* at 136-38. Justice Harlan concurred in the result, questioning whether it was appropriate for the Court to consider the failing company defense only at the time of the original operating agreement (1940) rather than when the agreement was renewed (1953). *Id.* at 140 (Harlan, J., concurring in the result).

<sup>379</sup>*Id.* at 139.

<sup>380</sup>*Id.* at 143 (Stewart, J., dissenting).

<sup>381</sup>*Id.* at 143-44.

<sup>382</sup>*Id.* at 143.

<sup>383</sup>*Id.* at 137 (citing *Int'l Shoe*, 280 U.S. at 302-03).

<sup>384</sup>The Court went on to say that "[t]here is no . . . doubt that in doing so they exercised a judgment which was both honest and well informed . . . in the familiar presumption of rightfulness which attaches to human conduct in general." *Int'l Shoe*, 280 U.S. at 302.

<sup>385</sup>369 U.S. 654 (1961).

of the genuine issues of material fact not resolved adequately for summary judgment was whether the defendant "was the only bona fide prospective purchaser for HHM's business."<sup>386</sup> The issue "at least in part" was "a head-on factual controversy . . . of whether other offers for HHM's assets or business were actually made."<sup>387</sup>

Thus, Justice Douglas, who of course was part of (and probably authored) the *Diebold per curiam* opinion, took the failing company doctrine down a slippery slope. Taking the doctrine as he found it in *International Shoe*, where the distressed company's opinion as to whether any non-competing suitors existed was presumed to be in good faith and superior to a reviewing court's second guessing, he transformed it to an affirmative duty of the failing company defendant to seek those suitors, even if futile. That affirmative duty extends beyond *Diebold*, in which the Court did not require evidence of other offers and held they were merely probative of whether the defendant was the only viable purchaser of the failing entity.

The year following the *Citizen Publishing* decision, Congress passed The Newspaper Preservation Act<sup>388</sup> to validate joint newspaper operating agreements under the antitrust laws as long as no more than one of the newspapers entering into the arrangement was "likely to remain or become a financially sound publication." The Act requires prior written consent of the U.S. Attorney General.<sup>389</sup>

Justice Douglas also made quick work of the failing company defense two years after *Citizen Publishing* in the *Greater Buffalo Press* case.<sup>390</sup> There he reversed a lower court's application of the defense, which had allowed the merger of two color comic supplement printers, ruling that the defendant had not satisfied either requirement. International Color Printing, the acquired company, had not exhibited "the grave probability of a business failure" even though its sole customer was threatening to place its business elsewhere.<sup>391</sup> International Color Printing had also failed to meet its affirmative duty, arising from *Citizen Publishing*, to contact potential buyers beyond Greater Buffalo and King, its sole customer.<sup>392</sup>

In sum, Justice Douglas wanted it both ways with respect to Section 7. He was responsible both for expanding the reach of the section, as further noted below, and for limiting the failing company doctrine so as to restrict its viability as a legitimate Section 7 defense. While the affirmative duty requirement imposed in *Citizen*

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<sup>386</sup>*Id.* at 655.

<sup>387</sup>*Id.*

<sup>388</sup>15 U.S.C. §§ 1801-04 (1988).

<sup>389</sup>Under the Act, the Attorney General can only give consent if it is found that all the newspapers in the joint operating arrangement but one are failing newspapers. § 1803(b). For an appellate review of the Attorney General's approval of a merger proposal between competing Detroit newspapers, see *Michigan Citizens for an Independent Press v. Thornburgh*, 868 F.2d 1285 (D. C. Cir. 1989), *cert. granted*, 490 U.S. 1045 (1989).

<sup>390</sup>*United States v. Greater Buffalo Press, Inc.*, 402 U.S. 549 (1971).

<sup>391</sup>The customer, King Features Syndicate, had not threatened or invoked the six month cancellation clause in its contract. Further, the company had increased its profits and was planning for expansion. *Id.* at 555.

<sup>392</sup>Not surprisingly, Justice Douglas cited the *International Shoe* decision for the first requirement but not for the second, affirmative duty prong. For that, he cited *Citizen Publishing*. *Id.*

*Publishing* appears to have stood the test of time,<sup>393</sup> most of the Warren Court's Section 7 jurisprudence, led by Douglas, has not.

#### X. BANK MERGERS

The Warren Court, with Justice Douglas playing a prominent role, decided a number of cases involving the merger of competing banks. In some ways the bank merger cases were *sui generis* because they often concerned questions about the applicability of Section 7 to the banking industry. Not surprisingly, the Warren Court always found the means to strike down the targeted merger, although sometimes incurring the wrath of Congress.

The initial bank merger case, *United States v. Philadelphia National Bank* decision,<sup>394</sup> is famous for establishing the "presumptive illegality" standard of mergers resulting in undue market concentration. First, however, the Court had to travel a tortuous path to determine whether Section 7 even applied to the merger in question. The first question was whether Section 7, as amended by the 1950 Celler-Kefauver Amendments, covered bank asset mergers.<sup>395</sup> The Court somewhat surprisingly held that it did.<sup>396</sup> Second, the Court ruled that the Bank Merger Act of 1960<sup>397</sup> did not impliedly repeal the application of Section 7 to bank mergers.<sup>398</sup>

Although the Justice Department challenged the Philadelphia National Bank merger under Section 7 of the Clayton Act, it sued to enjoin a contemporaneous merger between banks in Lexington, Kentucky under the Sherman Act because of concerns about the applicability of Section 7 to bank mergers.<sup>399</sup> That case, *United States v. First National Bank & Trust Co. of Lexington*,<sup>400</sup> proceeded to the Supreme

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<sup>393</sup>See DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES, §§ 5.0-52 (1997).

<sup>394</sup>374 U.S. 321 (1963).

<sup>395</sup>Celler-Kefauver Act, ch. 1184, 64 Stat. 1125 (1950) (current version at 15 U.S.C. §§ 18, 21 (2000)).

<sup>396</sup>The Celler-Kefauver Amendments plugged the "asset" loophole by extending Section 7 to asset acquisitions by a "corporation subject to the jurisdiction of the Federal Trade Commission." Celler-Kefauver Act, ch. 1184, 64 Stat. 1125 (1950) (current version at 15 U.S.C. §§ 18, 21 (2000)). Since the FTC's jurisdiction specifically excluded banks, 15 U.S.C. § 45 (a)(6), the Celler-Kefauver Amendments likewise appeared to exclude banks. The *Philadelphia National Bank* Court ruled, however, that Congress intended to exclude from Section 7 "only assets acquisitions by [banks] . . . when not accomplished by merger." *Philadelphia Nat'l Bank*, 374 U.S. at 342.

<sup>397</sup>74 Stat. 129.

<sup>398</sup>*Philadelphia Nat'l Bank*, 374 U.S. at 350. The 1960 Act directed banking regulatory agencies to consider competitive factors before approving bank mergers. The Court, applying the standard maxim that implied immunity from the antitrust laws "are strongly disfavored[.]" ruled that the Act had no impact on the antitrust laws.

<sup>399</sup>*United States v. First Nat'l Bank and Trust Co. of Lexington*, 376 U.S. 665, 673 (1994) (Harlan, J., dissenting).

<sup>400</sup>*Id.* at 665.

Court in the term following the *Philadelphia National Bank* decision.<sup>401</sup> The Court, with Justice Douglas writing for the majority, had no difficulty reversing the district court decision and striking down the merger under Section 1 of the Sherman Act even absent the “prophylactic” language of the Clayton Act.<sup>402</sup>

The merger involved the first and fourth largest banks in Fayette County, Kentucky which resulted in a bank controlling about fifty-two percent of the area’s assets and deposits.<sup>403</sup> Justice Douglas relied on four forty to sixty-year-old railroad cases decided under the Sherman Act in finding that the bank merger met the restraint of trade standard.<sup>404</sup> He summarily dismissed the *Columbia Steel* precedent from which he had so vigorously dissented,<sup>405</sup> stating that it “must be confined to its special facts,”<sup>406</sup> with little explanation as to what those special facts might be.<sup>407</sup> Instead he included a long quote from *Columbia Steel*, which identified factors that support an unreasonable restraint of trade finding<sup>408</sup> and simply concluded that “[i]n the present case all those factors clearly point the other way, as we have seen.”<sup>409</sup>

In 1966, on the heels of the *Philadelphia National Bank* and *Lexington Bank* decisions, Congress expressed its displeasure with the Court, as well as clarified the applicability of the Clayton Act to bank mergers, by passing the Bank Merger Act “exempting existing bank mergers, including those in pending government suits,

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<sup>401</sup>The Comptroller of Currency approved the Philadelphia bank merger on February 24, 1961, *Philadelphia Nat’l Bank*, 374 U.S. at 333, and the Lexington bank merger three days later on February 27, 1961. *First Nat’l Bank and Trust*, 376 U.S. at 667. The Justice Department formally challenged both mergers immediately.

<sup>402</sup>*First Nat’l Bank and Trust*, 376 U.S. at 672-73. The Clayton Act language “may be substantially to lessen competition or to tend to create a monopoly” focuses on the probable competitive impact on the merger in the future in contrast to the Sherman Act’s “restraint of trade” language which requires proof of an actual, as opposed to probable, offense. See, e.g., *FTC v. Morton Salt Co.*, 334 U.S. 37, 54 (1948).

<sup>403</sup>*First Nat’l Bank and Trust*, 376 U.S. at 668-69.

<sup>404</sup>*United States v. S. Pac. Co.*, 259 U.S. 214 (1922); *United States v. Reading Co.*, 253 U.S. 26 (1920); *United States v. Union Pac. R. Co.*, 226 U.S. 61 (1912); *N. Secs. Co. v. United States*, 193 U.S. 197 (1904). According to Justice Douglas, “[t]he four railroad cases at least stand for the proposition that where merging companies are major competitive factors in a relevant market, the elimination of significant competition between them, by merger or consolidation, itself constitutes a violation of [Section] 1 of the Sherman Act.” *First Nat’l Bank and Trust*, 376 U.S. at 671-72.

<sup>405</sup>*United States v. Columbia Steel Co.*, 334 U.S. 495, 534-40. See *supra* text accompanying notes 118-19.

<sup>406</sup>*First Nat’l Bank and Trust*, 376 U.S. at 672.

<sup>407</sup>In describing *Columbia Steel*, he noted that the Court had “observed, *inter alia*, that because of rate structures and the location of United States Steel’s fabricating subsidiaries, the latter were unable to compete effectively in Consolidated’s market.” *Id.* (emphasis added).

<sup>408</sup>*Id.* (quoting *Columbia Steel*, 334 U.S. at 527-28).

<sup>409</sup>*First Nat’l Bank and Trust*, 376 U.S. at 672. Justices Brennan and White concurred in the result but believed the result was dictated solely on the *Columbia Steel* precedent. *Id.* at 673. Justices Harlan and Stewart dissented, as they did with most of the merger decisions in the 1960s. *Id.* (Harlan, J., dissenting).

from Section 1 of the Sherman Act and Section 7 of the Clayton Act.”<sup>410</sup> The Act specified that future bank mergers were “subject to the Clayton Act scrutiny unless their anticompetitive effects were ‘clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community served.’”<sup>411</sup>

Although the Bank Merger Act of 1966 seemingly provided a new defense for the proponents of a bank merger, the Douglas-led Court soon minimized its efficacy. In *United States v. First City Bank of Houston*, decided the term following the Bank Merger Act, Justice Douglas wrote for the Court and held that the burden to establish “the public interest” defense was on the banks purporting to merge.<sup>412</sup> Further, even though the Act required the Comptroller of Currency find that the anticompetitive effects of a bank merger must be “clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served[,]”<sup>413</sup> Douglas ruled that Congress intended that judicial review be *de novo*.<sup>414</sup> That meant, according to Douglas, an independent determination of the issues by the reviewing court.<sup>415</sup> Thus, Douglas rejected the argument that the judiciary must sustain an administrative agency’s decision unless it is not supported by substantial evidence.<sup>416</sup>

One term later, in *United States v. Third National Bank in Nashville*, the Court applied the *de novo* review specified in the *Bank of Houston* case and overturned a district court finding that upheld the merger between the second and fourth largest banks in Nashville.<sup>417</sup> Although the Court stated that “the legislative history of the

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<sup>410</sup>12 U.S.C. § 1828(c) (1966). See *United States v. Third Nat’l Bank in Nashville*, 390 U.S. 171, 177 (1968) (“Congress was evidently dissatisfied with the 1960 Bank Merger Act as that Act was interpreted in *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963), and in *United States v. First National Bank & Trust Co. of Lexington*, 376 U.S. 665 (1964), and wished to alter both the procedures by which the Justice Department challenges bank mergers and the legal standard which courts apply in judging those mergers.”) (citations omitted).

<sup>411</sup>§ 1828(c)(5)(B). The Act gives the Department of Justice only thirty days to challenge bank mergers following approval by the appropriate banking agencies but automatically stays any merger challenged, thus preventing the necessity and difficulty of unraveling a consummated merger. § 1828(c)(6).

<sup>412</sup>*United State v. First City Nat’l Bank of Houston*, 386 U.S. 361, 366 (1967).

<sup>413</sup>§ 1828(c)(5)(B).

<sup>414</sup>*Bank of Houston*, 386 U.S. at 367-70. The statute provided that a court in an antitrust action “shall review *de novo* the issues presented.” Justice Douglas rejected the argument that the use of the word “review” rather than “trial” indicated a more limited scope of judicial review. *Id.* at 368.

<sup>415</sup>*Id.*

<sup>416</sup>*Id.* at 366-67. Justice Douglas characterized the 1966 Bank Merger Act as “the product of powerful contending forces, each of which in the aftermath claimed more of a victory than it deserved, leaving the controversy that finally abated in Congress to be finally resolved in the courts.” *Id.* at 367.

<sup>417</sup>*Third Nat’l Bank in Nashville*, 390 U.S. at 173, 192-93 (1968). The Court’s opinion by Justice White was joined by Justice Douglas and three other justices. *Id.* Justice Harlan,

Bank Merger Act of 1966 leaves no doubt that the Act was passed to make substantial changes in the law applicable to bank mergers[.]" the Court again held that it was not bound by an administrative agency's determination of the convenience and needs of the community.<sup>418</sup> According to the Court, the defending bank must establish that it could not meet the community's convenience and necessity needs without merging with a competitor.<sup>419</sup>

In effect, the *Bank of Houston* and *Third National Bank in Nashville* decisions continued to apply standard Warren Court Section 7 analysis to bank mergers, undeterred by the 1966 Act.<sup>420</sup> Its interpretation of the "convenience and needs" standard, placing the burden on the defendant to meet the standard, and giving little or no weight to administrative determinations of the standard produced no demonstrable change to "pure" antitrust enforcement of bank mergers under Section 7, irrespective of congressional intent.<sup>421</sup> Justice Douglas and his Warren Court brethren made it clear that they were not about to cede Clayton Act enforcement authority to an administrative agency absent an unequivocal congressional mandate.

#### XI. POTENTIAL COMPETITION

In the 1960s and 70s, the Warren Court aggressively expanded the application of Section 7 to mergers that were not between direct competitors or firms in a vertical relationship but involved companies in complementary markets, whether by virtue of their products or geography. Not surprisingly, on that Court, Justice Douglas was the leading expansionist of Section 7 to what became known as conglomerate mergers.<sup>422</sup> He wrote three of the first four Supreme Court opinions applying potential competition theory to mergers,<sup>423</sup> wrote a dissent in the other,<sup>424</sup> and penned

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joined by Justice Stewart, again dissented and Justices Fortas and Marshall did not participate. *Id.* at 192-93.

<sup>418</sup>*Id.* at 177.

<sup>419</sup>Poor management was the problem for the Nashville Bank. The Court held that defendant had to show that it made reasonable efforts to solve the management problem short of merger or that any attempts would have been unlikely to succeed. *Id.* at 188, 192.

<sup>420</sup>The Court had commented that the 1966 Bank Merger Act "was more clear and more specific in prescribing new procedures for testing mergers than in expounding the new standard by which they should be judged." *Id.* at 178.

<sup>421</sup>See also ROGERS, ET AL., *supra* note 106, at 533.

<sup>422</sup>Bruce Allen Murphy, Justice Douglas' most recent biographer, points out that in 1962 with the appointment of Justice Goldberg to replace Justice Frankfurter, Douglas finally had a five-vote liberal majority (Chief Justice Warren, and Justices Black, Brennan and Goldberg) with which to push his individual rights agenda. (In 1962 President Kennedy also appointed Justice White to replace Justice Whittaker but White was not the liberal that Kennedy had hoped for). MURPHY, *supra* note 10, at 360. It is not perhaps too much of a stretch to suggest that the same liberal majority gave Douglas somewhat of a carte blanche to push his hawkish, expansionist antitrust agenda. In any event, he produced more questionable antitrust decisions in the 1960s and early 1970s than at any other period during his long career on the Supreme Court.

<sup>423</sup>See *Ford Motor Co. v. United States*, 405 U.S. 562 (1972); *FTC v. Proctor & Gamble Co.*, 386 U.S. 568 (1967); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964).

the only opinion in which the Court has ever ruled that the opportunity for reciprocal dealing is sufficient to block a merger between non-competing companies.<sup>425</sup>

*El Paso Natural Gas* was the first Section 7 case to directly consider the impact of potential competition on a merger.<sup>426</sup> It involved the planned acquisition by El Paso Natural Gas, the sole out-of-state natural gas supplier to California, of Pacific Northwest Pipeline, the operator of pipelines throughout the west but not in or to California.<sup>427</sup> At the time of the merger, Pacific Northwest had tentatively agreed with Southern California Edison, the largest industrial user of natural gas in the state, to build a pipeline into California to supply Edison with natural gas.<sup>428</sup> While El Paso successfully opposed Pacific's plan to build a pipeline into California throughout the regulatory process, it also offered Edison much better gas prices and promises of uninterrupted deliveries.<sup>429</sup>

Justice Douglas quickly seized on the impact Pacific had on the California natural gas market as a potential, rather than actual, entrant, stating that "[w]e would have to wear blinders not to see that the mere efforts of Pacific Northwest to get into the California market, though unsuccessful, had a powerful influence on El Paso's business attitudes within the State."<sup>430</sup> According to Douglas, the fact that Pacific Northwest was effectively locked out of the California market and thus had no present market share was not relevant because, with the demand for natural gas growing by 200 million feet per day,<sup>431</sup> it would have future opportunities to compete.<sup>432</sup>

Justice Douglas did not articulate a test for establishing a potential competition claim, although he did suggest that the high entry barriers in the pipeline industry and Pacific Northwest's singular position as a potential entrant were important factors.<sup>433</sup> The closest he came to language that might have general application was

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<sup>424</sup>United States v. Penn-Olin Chem. Co., 379 U.S. 158, 177 (1964) (Douglas, J., dissenting).

<sup>425</sup>FTC v. Consol. Foods Corp., 380 U.S. 592 (1965).

<sup>426</sup>United States v. El Paso Nat'l Gas Co., 376 U.S. 651 (1964). The Court in the *Columbia Steel* case, which was brought under Section 1 of the Sherman Act, had briefly considered the impact of potential competition. United States v. Columbia Steel Co., 334 U.S. 495, 528-29 (1948). Justice Douglas' dissent in *Columbia Steel* did not deal with potential competition. *Id.* at 534-40. See *supra* generally text accompanying note 186.

<sup>427</sup>El Paso supplied more than fifty percent of the natural gas in the state. *El Paso Nat'l Gas*, 376 U.S. at 652 n.2.

<sup>428</sup>Edison preferred that arrangement to continuing to purchase natural gas from El Paso because El Paso was only able to offer interruptible gas service through its distributors. Pacific's gas would be non-interruptible and, because no distributors would be involved, less expensive than El Paso's. *Id.* at 654-55.

<sup>429</sup>*Id.* at 655.

<sup>430</sup>*Id.* at 659.

<sup>431</sup>*Id.* at 658.

<sup>432</sup>*Id.* at 660.

<sup>433</sup>*Id.* at 660-61. El Paso actually took control of Pacific Northwest in 1957. *Id.* By the time the case wound its way to the Supreme Court seven years later, however, two more interstate pipelines had entered California. *Id.* at 661.



when he wrote that “[t]he effect on competition in a particular market through acquisition of another company is determined by the nature or extent of that market and by the nearness of the absorbed company to it, that company’s eagerness to enter that market, its resourcefulness, and so on.”<sup>434</sup>

Although little doctrine comes from *El Paso Natural Gas*, it is hard to quibble with the result since Pacific Northwest’s attempts to enter California were certainly affecting El Paso’s decisions within the market. Further, the decision, the first to rest on potential competition, is an innovative one.<sup>435</sup>

Only two months later, however, in *United States v. Penn-Olin Chemical Co.*, the Court faced a more difficult application of the potential competition theory.<sup>436</sup> The government had challenged a joint venture between Pennsalt Chemicals and Olin Mathieson Chemical Corporation for the purpose of producing and selling sodium chlorate in the southeast.<sup>437</sup> The majority applied dual potential competition tests: (1) determining whether both of the joint venturers were potential entrants to see if the joint entry foreclosed the competitive benefits of individual entry and, if not, (2) determining whether only one of the joint venturers was a potential entrant and, if so, whether the other was a potential entrant that would exert competitive influence “in the wings” of the market.<sup>438</sup> Since the district court had not considered the second test, the Court vacated and remanded.

*Penn-Olin* represents a substantial expansion of potential competition doctrine beyond *El Paso Natural Gas* because it questions whether new market entry through a joint venture is as pro-competitive as individual entry might have been.<sup>439</sup> Still, Justice Douglas did not believe that the majority had gone far enough and dissented, joined by his regular ally, Justice Black.<sup>440</sup> In Douglas’ view, the joint venture was

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<sup>434</sup>*Id.* at 660.

<sup>435</sup>Arguably the Warren Court would have been better advised to apply potential competition analysis to some of its earlier, questionable “horizontal” merger cases. *See, e.g.*, *United States v. Von’s Grocery Co.*, 384 U.S. 270 (1966) (holding there was a horizontal merger even though only twenty-five percent of grocery stores of two companies competed); *United States v. Cont’l Can Co.*, 378 U.S. 441 (1964) (treating metal and glass containers as one market in spite of fact that there was little current end use competition between the two and Court acknowledged fact that merger involved “inter-industry” competition).

<sup>436</sup>378 U.S. 158 (1964).

<sup>437</sup>Pennsalt did not produce sodium chlorate in the southeast; Olin Mathieson did not produce sodium chlorate but did market it, although not in the southeast. *Id.* at 160-203.

<sup>438</sup>*Id.* at 175-76. *See also* Joseph F. Brodley, *Joint Ventures and Antitrust Policy*, 94 HARV. L. REV. 1521, 1537-38 (1982); Thomas Piraino, *Beyond Per Se, Rule of Reason or Merger Analysis: A New Antitrust Standard for Joint Venture*, 76 MINN. L. REV. 1 (1991); Robert Pitofsky, *Joint Ventures Under the Antitrust Laws: Some Reflections on the Significance of Penn-Olin*, 82 HARV. L. REV. 1007 (1969).

<sup>439</sup>*Accord* Darren Bush & Salvatore Massa, *Rethinking the Potential Competition Doctrine*, 2004 WIS. L. REV. 1035, 1050. Pennsalt had never sold directly in the southeast market targeted by the joint venture while Olin had never produced sodium chlorate, although it had for the last few years distributed the product in the southeast for Pennsalt to test the demand. *Cont’l Can*, 378 U.S. at 161-62.

<sup>440</sup>*Id.* at 177-184 (Douglas, J., dissenting). Justices White and Harlan also dissented; White without opinion and Harlan with a memorandum opinion.

akin to a per se market division between the two since it divided the market "fifty-fifty" and foreclosed all competition between them.<sup>441</sup> He thought it probable<sup>442</sup> that one of the two, if not both, joint venturers would have entered the market independently with the other on the periphery as "a potent competitive factor."<sup>443</sup> He saw no reason to remand a case when the joint venture "was launched at the very threshold of the entry of two potential competitors into a territory."<sup>444</sup>

Thus, Justice Douglas took the extreme view that two firms, which had not entered a market but might, engaged in what amounted to a per se market division by agreeing to enter the market together. Since he placed the per se tag on the activity, the concentration of the market, the level of entry barriers, and number of other potential competitors were apparently not relevant.<sup>445</sup>

Justice Douglas wrote for a six-justice majority in the next potential competition case to reach the Court, *FTC v. Procter & Gamble Co.*,<sup>446</sup> decided three years after *Penn-Olin*. There the Court found that Procter & Gamble had violated Section 7 by acquiring Clorox, the largest manufacturer of household bleach, because P&G was a potential entrant in that market.

Justice Douglas noted that P&G had considered entering the liquid bleach market by internal expansion but had decided that acquiring Clorox, with its fifty percent market share, would quickly give it a dominant position.<sup>447</sup> He concluded that the acquisition produced two likely anticompetitive effects. First, since P&G manufactured complementary detergent products marketed and advertised in the same manner as liquid bleach, through grocery stores and by mass media, it influenced the liquid bleach market as a potential competitor.<sup>448</sup> Second, the acquisition of Clorox by as large a company as P&G would serve to entrench Clorox as the industry leader, discouraging entry by others and effectively raising entry barriers.<sup>449</sup> In addition, Douglas rejected the notion that efficiency gains resulting

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<sup>441</sup>*Id.* at 182.

<sup>442</sup>"[Section] 7 deals only with probabilities, not certainties." *Id.*

<sup>443</sup>*Id.*

<sup>444</sup>*Id.* To allow such a joint venture would be to avoid Section 7 "by sophisticated devices." *Id.*

<sup>445</sup>In contrast to the majority opinion which looked to several criteria such as the structure and history of the market, the stated reason for the joint venture, actual competition between the two firms, and the level of competition in the market but for the joint venture to assess whether the joint venture has caused or was likely to cause an anticompetitive effect. *Id.* at 176-77. See also Bush & Massa, *supra* note 439, at 1051.

<sup>446</sup>386 U.S. 568 (1967). Justices Stewart and Fortas did not participate and Justice Harlan wrote a concurring opinion.

<sup>447</sup>*Id.* at 574.

<sup>448</sup>*Id.* at 578. The FTC had found that P&G was the most likely entrant into the liquid bleach market. *Id.* at 580-81.

<sup>449</sup>*Id.* at 578.

from a merger could ever be used as a defense to illegality,<sup>450</sup> a point vigorously disputed by Justice Harlan in his concurrence.<sup>451</sup>

Although the *Procter & Gamble* Court reversed the Sixth Circuit's dismissal of the FTC's complaint, Justice Douglas believed that only a summary of the FTC's findings was necessary since "the anticompetitive effects with which this product-extension merger is fraught can be easily seen . . . ."<sup>452</sup> Justice Harlan and many commentators have disagreed that the case was easy<sup>453</sup> and perhaps more telling, have asserted that Douglas improperly made assumptions and drew conclusions from the facts presented. For example, Douglas' characterization of the liquid bleach market as "oligopolistic" and non-competitive, which formed the basis of his finding of both likely anticompetitive effects, is suspect.<sup>454</sup> Further, his "entrenchment" theory, mentioned almost in passing at the end of the *Procter & Gamble* opinion, created a lot of attention but has found little or no favor subsequently.<sup>455</sup>

Similarly Justice Douglas' rather cavalier and summary dismissal of efficiency gains as a defense to a Section 7 action, harkening back to the misguided *Brown Shoe* opinion,<sup>456</sup> is at odds with current thinking.<sup>457</sup> Just as in *Brown Shoe*, the FTC

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<sup>450</sup>*Id.* at 580, citing the infamous *Brown Shoe* decision. Later in *United States v. First National Bank and Trust Co. of Lexington*, 376 U.S. 665, 669 (1964), Justice Douglas, writing for the majority, ruled that a merger of two banks violated Section 7 because "the multiplicity of extra services in the trust field which the new company could offer tends to foreclose competition." See *supra* text accompanying notes 392-401. So much for the needs of consumers of trust departments in Lexington, Kentucky.

<sup>451</sup>*Procter & Gamble*, 386 U.S. at 603-04.

<sup>452</sup>*Id.* at 578.

<sup>453</sup>"I consider the case difficult within its own four corners, and beyond that, it portends for future administrative and judicial application of Section 7 . . . to this kind of merger important and far-reaching." *Id.* at 581-82.

<sup>454</sup>In addition to Clorox's almost 50% market share, the top two firms controlled 65% of the market and the top six 80%. Two hundred small producers accounted for the remaining 20%. *Id.* at 575-76. There was no indication, however, that Clorox or the other market leaders could have priced above competitive levels or reduced output to increase price, thus rendering Procter & Gamble's influence as a potential entrant a nullity. See ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 259-60 (1978); Donald F. Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV. 1313, 1363 (1965).

<sup>455</sup>The entrenchment theory can actually be traced to a vertical merger case, *Reynolds Metals Co. v. FTC*, 309 F.2d 223 (D.C. Cir. 1962), a case that Justice Douglas did not cite in *Procter & Gamble*, perhaps in keeping with his sometimes remark to friends that "I don't follow precedents, I make 'em." MURPHY, *supra* note 10, at 340. For examples of subsequent cases in which an entrenchment theory has failed, see *FTC v. Atlantic Richfield Co.*, 549 F.2d 289, 298 (4th Cir.), and *Missouri Portland Cement Co. v. Cargill, Inc.*, 498 F.2d 851, 865 (2d Cir. 1974). Cf. *Kennecott Copper Co. v. FTC*, 467 F.2d 67, 78 (10th Cir. 1972), *cert denied*, 416 U.S. 909 (1974). See also Lawrence K. Hellman, "Entrenchment" Under Section 7 of the Clayton Act: An Approach for Analyzing Conglomerate Mergers, 13 LOY. U. CHI. L.J. 225 (1982) (arguing for use of entrenchment theory in conglomerate mergers if certain conditions are present).

<sup>456</sup>See *supra* notes 292-93 and accompanying text.

paradoxically viewed the efficiencies that P&G would gain in marketing and distributing Clorox bleach as anticompetitive.<sup>458</sup> Douglas, of course, accepted the FTC's finding that those efficiencies would raise entry barriers without consideration of the fact that they might enhance consumer welfare.<sup>459</sup>

Justice Harlan seems to have gotten it right when he lamented that Justice Douglas' *Procter & Gamble* opinion "leaves the Commission, lawyers, and businessmen at large as to what is to be expected of them in future cases of this kind."<sup>460</sup> The decision applies the concept of potential competition without any real contours, endorses a questionable new theory, entrenchment, with little analysis, and summarily trashes efficiencies as a Section 7 defense.

Not surprisingly, Justice Douglas wrote the majority opinion in the next conglomerate merger case to reach the Court, *Ford Motor Co. v. United States*.<sup>461</sup> The case was made to order for Douglas since it allowed for his expansionist theories in both vertical and conglomerate contexts.<sup>462</sup> Ford Motor's acquisition of Autolite, one of three major spark plug manufacturers that together controlled eighty-five percent of the market, was in lieu of its entering the market de novo, which it had determined would be more costly and would take up to eight years.<sup>463</sup> Although the main issue before the Court was whether divestiture was the appropriate remedy,<sup>464</sup> Justice Douglas also agreed that the district court had properly found that as a potential entrant Ford Motor exacted significant pro-competitive effects on the concentrated spark plug market.<sup>465</sup>

Ford had argued that its acquisition had actually benefited the spark plug market since it would make Autolite, with only fifteen percent of the market, a more

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<sup>457</sup>See DEP'T OF JUSTICE AND FED'L TRADE COMM'N HORIZONTAL MERGER GUIDELINES § 4 (1997) available at <http://www.usdoj.gov/atr/public/guidelines/hmg.htm>.

<sup>458</sup>*Procter & Gamble Co.*, Docket 6901, 63 FTC 1465, 1580 (1963).

<sup>459</sup>Justice Harlan thought that the question should be asked and that economies in advertising could benefit consumers by providing brand identification and quality assurance, although he concluded that P&G had not shown any real advertising efficiencies. *Procter & Gamble*, 386 U.S. at 603-04. He was probably correct that advertising efficiencies were lacking. See, e.g., John L. Peterman, *The Clorox Case and the Television Rate Structures*, 12 J.L. & ECON. 321 (1968) (asserting that Procter & Gamble did not actually have advertising cost advantages which could entrench it in the liquid bleach market). Accord BORK, *supra* note 454, at 254-55. There is a substantial debate about whether conglomerate mergers ever produce real efficiencies, at least any that ultimately benefit consumers. See, e.g., Rogers, *supra* note 298, at 312-17; F. M. Scherer, *Book Review, The Posnerian Harvest: Separating the Wheat from the Chaff*, 86 YALE L.J. 974, 987-88 (1977).

<sup>460</sup>*Procter & Gamble*, 386 U.S. at 583. Judge Bork wrote that Justice Douglas' "murky" opinion "makes sense only when antitrust is viewed as pro-small business—and even then it does not make much sense, because small business is protected from Clorox's cost advantages only when they happen to be achieved through a merger." BORK, *supra* note 454, at 255.

<sup>461</sup>405 U.S. 562 (1972).

<sup>462</sup>See *supra* text accompanying notes 414-37; sources cited *supra* notes 482-96.

<sup>463</sup>*Id.* at 566.

<sup>464</sup>The majority, per Justice Douglas, thought it was. *Id.* at 571-78.

<sup>465</sup>*Id.* at 574.

effective competitor against Champion, with almost a fifty percent share, and General Motors, which controlled thirty percent of the market.<sup>466</sup> Justice Douglas disagreed, in part because the merger would also eliminate Ford as one of the two largest purchasers of original equipment spark plugs.<sup>467</sup>

More questionable, however, was his quotation from *Philadelphia National Bank* to the effect that choosing between “economic debits and credits” is beyond “judicial competence.”<sup>468</sup> Here Justice Douglas is at least consistent with his quick dismissal of the relevance of efficiencies in *Procter & Gamble*,<sup>469</sup> since that would require some weighing or judicial choice-making, as well as the anti-Rule of Reason position of the Warren and early Burger Courts.<sup>470</sup> Douglas favored bright line per se rules generally and in the merger arena, any showing of likely anticompetitive effect was enough to render the merger illegal.<sup>471</sup>

The Douglas-led expansion of Section 7 into potential competition posited that a firm sitting on the sidelines of a market exerted competitive influence on market participants who are worried about the threat of new entry. This thinking became known as the doctrine of perceived potential competition<sup>472</sup> and was the subject of further Court scrutiny in three decisions in 1973 and 1974.<sup>473</sup> In *Falstaff*, a sharply

<sup>466</sup>*Id.* at 569-70.

<sup>467</sup>*Id.* at 570-71. He also believed that Ford would gain access to the spark plug aftermarket which would help perpetuate the so-called original equipment tie, the replacement of the same brand of spark plugs as the original. *Id.* at 570.

<sup>468</sup>*Id.* at 569-70 (quoting *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 371 (1963)).

<sup>469</sup>*See supra* text accompanying notes 415, 438-53.

<sup>470</sup>*See*, for example, *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), which established a per se rule the Court overruled ten years later once Justices Douglas and Black had retired. *See Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). Justice Douglas' position in *Ford Motor* parallels that of the Court in *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), decided that same year. There, in a 4-1-1 opinion with Justices Powell and Rehnquist not participating, the majority, including Justice Douglas, applied the per se rule to horizontal non-price restraints, stating that whether they would decide the case the same way under the rule of reason “is irrelevant to the issue before us.” *Id.* at 609. According to Justice Marshall, writing for the Court, Congress could overturn per se rules if it so chooses, “leav[ing] courts free to ramble through the wilds of economic theory in order to maintain a flexible approach.” *Id.* at 609 n.10.

<sup>471</sup>*See, e.g.*, *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 576-77 (1967).

<sup>472</sup>*See, e.g.*, *ROGERS, ET AL.*, *supra* note 106, at 632-33; *SULLIVAN & GRIMES*, *supra* note 281, at 659-61.

<sup>473</sup>*See* *United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973); *United States v. Marine Bancorporation*, 418 U.S. 602 (1974); *United States v. Conn. Nat'l Bank*, 418 U.S. 656 (1974). The Court in those cases also discussed, without ratifying, the actual potential competition theory which attempts to predicate Section 7 liability upon a showing that the acquiring company would have entered the market de novo or by a “toehold” acquisition if not permitted to acquire the company at issue and that such an alternative entry would be procompetitive. *See, e.g.*, *BOC Int'l, Ltd. v. FTC*, 557 F.2d 24, 26-28 (2d Cir. 1977); *Tenneco, Inc. v. FTC*, 689 F.2d 346 (2d Cir. 1982). *See generally* *ROGERS, ET AL.*, *supra* note 106, at 630-33.

divided Court reversed a lower court ruling that failed to consider the effect of Falstaff as a potential entrant to the New England beer market. Falstaff, the fourth largest brewer nationally and the largest brewer that did not have a presence in New England, had acquired Narragansett, a regional brewer with the largest share of the New England market.<sup>474</sup> Although Falstaff argued, and the district court found, that it would never have entered the New England market *de novo*, the Court reversed and remanded, directing the lower court to consider the probable impact of Falstaff on the market as a potential competitor.<sup>475</sup>

The majority opinion drew two strong opposing opinions, one concurring in the result by Justice Marshall and the other by Justice Rehnquist dissenting, which both argued stridently that the majority had gone too far.<sup>476</sup> Justice Douglas, however, was moved to write a partial concurrence arguing that the majority had not gone far enough in merely reversing and remanding.<sup>477</sup> In spite of pointed language by Marshall and Rehnquist that there was no factual basis for the Court's remand order,<sup>478</sup> Douglas asserted that the Court should have reversed and *rendered*. After a polemic on the inherent evils of corporate growth by acquisition or merger,<sup>479</sup> Douglas argued that even though Falstaff would not have entered the New England market *de novo* had it not been allowed to acquire Narragansett, it might sometime in the future change its mind.<sup>480</sup> Further, he opined, that Falstaff was the most likely new competitor and that replacing the leading regional brewer with a beer seller "with national capabilities increased the trend toward concentration" and was sufficient to violate Section 7.<sup>481</sup>

With its changing composition, the Court further reigned in the application of potential competition in two bank cases decided the term after *Falstaff*. Although Justice Douglas did not participate in the first decision, *United States v. Marine*

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<sup>474</sup>*Falstaff*, 410 U.S. at 528-29.

<sup>475</sup>*Id.* at 537.

<sup>476</sup>*Id.* at 545 (Marshall, J., concurring in the result); *Id.* at 572 (Rehnquist, J., dissenting, joined by Stewart, J.). Justices Marshall and Rehnquist both pointed out that the government had provided no factual basis on which a court could conclude that Falstaff was a perceived potential entrant into the New England beer market; thus the basis for the remand was not supported by the record. *Id.* at 546, 574-75.

<sup>477</sup>*Id.* at 538 (Douglas, J., concurring in part).

<sup>478</sup>"Thus, our remand leaves the hapless District Judge with the unenviable task of reassessing nonexistent evidence under a theory advanced by neither of the parties." *Id.* at 546 (Marshall, J., concurring in the result). "For this Court to reverse and to remand for consideration of a possible factual basis for a theory never advanced by the plaintiff is a drastic and unwarranted departure from the most basic principles of civil litigation and appellate review." *Id.* at 574-75 (Rehnquist, J., dissenting, joined by Stewart, J.).

<sup>479</sup>"The 'rising tide' of concentration in American business" was creating "a nation of clerks" and leading "predictably to socialism." *Id.* at 540, 543 (quoting *United States v. Pabst Brewing Co.*, 384 U.S. 546, 552).

<sup>480</sup>*Id.* at 544.

<sup>481</sup>*Id.* at 545.

*Bancorporation*,<sup>482</sup> he did join Justice White's four-justice dissent in the companion case *United States v. Connecticut National Bank*,<sup>483</sup> which was argued and then decided at the same time. That dissent took issue with the majority's narrow definition of the relevant market as the localized area in which the acquired bank operated which precluded the finding of an "in the wings" competitive effect outside of that market.<sup>484</sup>

The dissenters in *Connecticut National Bank* were all Warren Court holdovers,<sup>485</sup> thus illustrating that, by the narrowest of margins, the worm had turned on the extension and utilization of potential competition theories under Section 7.<sup>486</sup> The two bank cases, together with the *General Dynamics* decision that same term,<sup>487</sup> brought the "government always wins" heyday of Section 7 to an abrupt halt.

After its flurry of potential competition decisions in the 1960s and early 1970s, the Supreme Court has not addressed the topic since.<sup>488</sup> Lower courts have found that substantial proof and certainty problems plague the use of potential competition theories.<sup>489</sup> Commentators have likewise criticized the validity of potential competition generally as well as the lack of measurable standards or guidance from the Supreme Court.<sup>490</sup> Although the 1984 Department of Justice Merger Guidelines

<sup>482</sup>418 U.S. 602 (1974). *Marine Bancorporation* was a 5-3 decision in which the Court held that regulatory barriers precluded both de novo entry and any "in the wings" competitive influence by the acquiring bank.

<sup>483</sup>418 U.S. 656 (1974).

<sup>484</sup>The dissent argued that more than one relevant market could be found as in *Pabst Brewing Co.*, harkening to Section 7's "any section of the country" language. *Id.* at 674.

<sup>485</sup>Justice White was joined by Justices Brennan and Marshall, in addition to Justice Douglas.

<sup>486</sup>The dissenters in the companion *Marine Bancorporation* decision in which Justice Douglas did not participate were also Justices White, Brennan and Marshall. *Marine Bancorporation*, 418 U.S. at 643.

<sup>487</sup>*United States v. Gen. Dynamics Corp.*, 415 U.S. 486 (1974). See *supra* text accompanying notes 349-58.

<sup>488</sup>In fact, the Supreme Court has not selected for review any Section 7 case since its 1974 term.

<sup>489</sup>See, e.g., *Tenneco, Inc. v. FTC*, 689 F.2d 346 (2d Cir. 1982); *United States v. Siemens Corp.*, 621 F.2d 499 (2d Cir. 1980); *FTC v. Atl. Richfield Co.*, 549 F.2d 289 (4th Cir. 1977); *Babcock & Wilcox Co. v. United Techs. Corp.*, 435 F. Supp. 1249 (D. Ohio 1977); *FTC v. Tenneco, Inc.*, 433 F. Supp. 105 (D.D.C. 1977); *United States v. Black & Decker Mfg. Co.*, 430 F. Supp. 729 (D. Md. 1976); *United States v. Hughes Tool, Co.*, 415 F. Supp. 637 (D. Cal. 1976).

<sup>490</sup>See, e.g., Joseph F. Brodley, *Potential Competition Mergers: A Structural Synthesis*, 87 YALE L.J. 1, 26 (1977) ("[T]here is no way the judicial process can directly handle concepts of this complexity and indeterminacy."); Joseph F. Brodley, *Limiting Conglomerate Mergers: The Need for Legislation*, 40 OHIO ST. L.J. 867, 869 n.8 (1979) (calling potential competition "a doctrine of almost metaphysical complexity"); William Allen Alper, *Potential Competition: An Idea Whose Time Has Passed*, 50 BROOK. L. REV. 407, 431 (1984) ("No objective evidence is likely to prove, with the degree of certainty courts must require, those facts that would invoke potential competition theory in any real situation."); Joseph P. Bauer, *Challenging Conglomerate Mergers Under Section 7 of the Clayton Act: Today's Law and Tomorrow's*

do consider potential competition as the only viable theory for attacking conglomerate mergers,<sup>491</sup> the government has run into a skeptical judiciary and has relatively little incentive for challenging conglomerate acquisitions.<sup>492</sup>

Although the government has obtained consent decrees in a few cases involving potential competition,<sup>493</sup> enforcement efforts have been sporadic and uncertain. Its future does not seem bright and, as one commentator has suggested, it may soon join "the scrap heap of defunct merger theories."<sup>494</sup>

Justice Douglas' contributed another theory to that "scrap heap." In *FTC v. Consolidated Foods Corp.*,<sup>495</sup> he wrote for the Court and condemned a merger because it facilitated reciprocal dealing with third parties. Consolidated, which operated food processing plants as well as retail food stores, had acquired Gentry, Inc., a manufacturer of dehydrated onion and garlic commonly used in processed foods. For the ten years following, Consolidated often urged its processed food suppliers to purchase their dehydrated onion and garlic from Gentry.

The Seventh Circuit had relied mostly on post-acquisition evidence and concluded that the probability of a lessening of competition was not established, pointing out that while Gentry's share of the dehydrated onion market had increased by seven percent, its share of the dehydrated garlic market had decreased twelve

*Legislation*, 58 B.U. L. REV. 199, 225-26 (1978); Richard S. Markovits, *Potential Competition, Limit Price Theory, and the Legality of Horizontal and Conglomerate Mergers Under the American Antitrust Laws*, 1975 WIS. L. REV. 658, 664-66 (1975).

<sup>491</sup>DEP'T OF JUSTICE, MERGER GUIDELINES, §§ 4.111, 4.112, 4.131, 4.132, 4.133, 4.134 (1984). The jointly issued 1992 Merger Guidelines apply only to horizontal mergers and provide more guidance and specificity with respect to defining the relevant market. See DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES, § 1.32 (1992).

<sup>492</sup>The government often proceeds under the 1992 Guidelines, arguing for a broad market definition and avoiding potential competition issues by asserting that the claim is one of actual, ongoing competition. It has had a long history of success under this approach. See *United States v. Cont'l Can Co.*, 378 U.S. 441 (1964); *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997). See also Bush & Massa, *supra* note 439, at 1070-73, 1085. However, the strategy does not always work. See, e.g., *Equifax, Inc. v. FTC*, 618 F.2d 63 (9th Cir. 1980).

<sup>493</sup>See cases cited in Bush & Massa, *supra* note 439, at 1085. See also John E. Kwoka, *Non-Incumbent Competition: Mergers Involving Constraining and Prospective Competitors*, 52 CASE W. RES. L. REV. 173, 174 (2001) (asserting that government enforcement agencies have been lax in pursuing potential competition cases).

<sup>494</sup>HOVENKAMP, *supra* note 211, at 570. See also SULLIVAN & GRIMES, *supra* note 281, at 661 (stating potential competition doctrine "has fallen on hard times"). The so-called Actual Potential Competition theory, which attempts to measure the likelihood of actual entry by the acquiring firm, was never officially embraced by the Supreme Court. Although it has had limited success in attacking mergers, see *Yamaha Motor Co. v. FTC*, 657 F.2d 971 (8th Cir. 1981), *cert denied*, 456 U.S. 915 (1982), and *Mercantile Texas Corp. v. Board of Governors*, 638 F.2d 1255 (5th Cir. 1981) (approving doctrine in principle). The "reasonable probability of entry in the near future" standard is one that the government has not been able to meet and has essentially abandoned. See, e.g., *United States v. Siemens Corp.*, 621 F.2d 499 (2d Cir. 1980); *FTC v. Atl. Richfield Co.*, 549 F.2d 289 (4th Cir. 1977); *Babcock & Wilcox Co. v. United Techs. Corp.*, 435 F. Supp. 1249, 1285-86 (D. Ohio 1977); *United States v. Black & Decker Mfg. Co.*, 430 F. Supp. 729 (D. Md. 1976).

<sup>495</sup>380 U.S. 592 (1965).



percent.<sup>496</sup> It also noted that reciprocal buying had been unsuccessful on a number of occasions.<sup>497</sup>

Justice Douglas disagreed with the Seventh Circuit's evaluation of the post-acquisition evidence, finding that "[r]eciprocity was tried over and over again and it sometimes worked."<sup>498</sup> He rejected the view, however, that post-acquisition evidence was necessary, stating that "the force of Section 7 is in probabilities, not what later transpired."<sup>499</sup> It was enough to condemn the merger when the FTC found the probability of reciprocity involving an acquired company with a substantial market share.<sup>500</sup>

Justice Stewart, concurring in the judgment, believed that Section 7 required "more than a bare potential for reciprocal buying" to bar a merger and argued that "the law requires a more closely textured economic analysis" than provided by the majority.<sup>501</sup> He doubted that Consolidated could "strong-arm" Armour or Swift into buying dehydrated onions from Gentry but believed it could influence smaller suppliers, which led him to concur in the judgment.<sup>502</sup>

Following *Consolidated Foods*, the use of reciprocity to condemn mergers initially found some success in the lower courts.<sup>503</sup> Later decisions, however, applying the more closely textured economic analysis urged by Justice Stewart,<sup>504</sup> rejected attempts to challenge mergers on reciprocity grounds.<sup>505</sup> The more modern

<sup>496</sup>*Id.* at 598.

<sup>497</sup>*Id.*

<sup>498</sup>*Id.* at 600. According to Justice Harlan's concurrence, Consolidated was able to pressure suppliers to purchase from Gentry only seven times in a decade. *Id.* at 602 (Harlan, J., concurring in the judgment).

<sup>499</sup>*Id.* at 598.

<sup>500</sup>Gentry controlled thirty-two percent of the combined dehydrated garlic and onion market prior to the acquisition. It and industry leader Basic Vegetable Products together controlled almost ninety percent of a rapidly expanding market. *Consolidated Foods*, 380 U.S. at 595, 600.

<sup>501</sup>*Id.* at 603 (Stewart, J., concurring in the judgment). He required more than evidence that attempts at reciprocity "sometimes worked." *Id.* at 604.

<sup>502</sup>*Id.* at 607.

<sup>503</sup>See *Allis-Chalmers Mfg. Co. v. White Consol. Indus.*, 414 F.2d 506 (3rd Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970); *United States v. Ingersoll-Rand Co.*, 320 F.2d 509 (3rd Cir. 1963); *United States v. White Consol. Indus.*, 323 F. Supp. 1397 (D. Ohio 1971); *United States v. Gen. Dynamics Corp.*, 258 F. Supp. 36 (D.N.Y. 1966).

<sup>504</sup>See Note, *Reciprocity as a Basis for Challenging Conglomerate Mergers Under the Clayton Act*, 12 LOY. U. CHI. L.J. 481, 494-97 (1981).

<sup>505</sup>See, e.g., *Carrier Corp. v. United Techs. Corp.*, 1978-2 Trade Cas. (CCH) ¶ 62,393 (N.D.N.Y. 1978), *aff'd per curiam*, 1978-2 Trade Cas. (CCH) ¶ 62,405 (2d Cir. 1978); *United States v. Int'l Tel. & Tel. Corp.*, 1971 Trade Cas. (CCH) ¶ 73,619 (N.D. Ill. 1971) (regarding Canteen Corporation merger); *United States v. ITT*, 324 F. Supp. 19 (D. Conn. 1970) (regarding merger resulting from acquisition of stock in Grinnell); *United States v. Int'l Tel. & Tel. Corp.*, 306 F. Supp. 766 (D. Conn. 1969) (regarding stock acquisition in Grinnell and Hartford), *appeal dismissed*, 404 U.S. 801 (1971); *United States v. Northwest Indus., Inc.*, 301

thinking is that the mere opportunity for reciprocity is not enough because reciprocity is not necessarily anticompetitive absent evidence of coercion or forcing and, further, reciprocal dealing arrangements often enhance efficiency.<sup>506</sup> It appears that no reciprocity case has succeeded in well over thirty years. Further, the 1984 Merger Guidelines do not even mention reciprocity as a basis for a merger challenge and the government has not raised a reciprocity issue in many years.<sup>507</sup>

Justice Douglas also has the distinction, if that is the correct term, of writing the majority opinion in the last vertical merger case decided by the Supreme Court, *Ford Motor Co. v. United States*.<sup>508</sup> There the Court struck down the acquisition by Ford Motor of Autolite, one of the three leading makers of spark plugs with about 15% of the market. Since General Motors owned the AC brand of spark plugs and controlled 30% of the market, Champion was the only significant independent spark plug manufacturer remaining after Ford's acquisition of Autolite. Champion's market share had declined from just under 50% in 1960 to about 33% in 1966. In contrast, Autolite's market share had climbed from a pre-acquisition 15% to about 30%.<sup>509</sup>

Justice Douglas characterized the remedy issue as "[t]he main controversy here"<sup>510</sup> and quickly found substantively that the acquisition violated "the letter and spirit of the Celler-Kefauver Antimerger Act."<sup>511</sup> He readily upheld the district court's findings that the elimination of Ford both as a major customer of Champion and as a potential entrant into the sparkplug market de novo rendered the acquisition unlawful.<sup>512</sup> Secondly, he agreed with the district court that the merger increased entry barriers in the sparkplug industry by foreclosing Ford as a purchaser for about ten percent of the spark plug market and, considering General Motors' ownership of the AC brand, would transmit to the sparkplug industry "the rigidity of the oligopolistic structure of the automobile industry."<sup>513</sup>

In *Ford Motor*, Justice Douglas thus succinctly displays his antipathy to vertical market foreclosure and his favor with potential competition theory, both of which have now fallen on hard times.<sup>514</sup> Indeed, in *Ford Motor* the defendant argued that

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F. Supp. 1066 (N.D. Ill. 1969); *United States v. Penick & Ford, Ltd.*, 242 F. Supp. 518 (D.N.J. 1965).

<sup>506</sup>See, e.g., HOVENKAMP, *supra* note 211, at 561-63; SULLIVAN & GRIMES, *supra* note 281, at 626.

<sup>507</sup>See HOVENKAMP, *supra* note 211, at 563.

<sup>508</sup>405 U.S. 562 (1972). *Ford Motor Co.* also involved potential competition issues and is also characterized as a conglomerate merger decision. See *supra* text accompanying notes 453-60.

<sup>509</sup>*Ford Motor Co.*, 405 U.S. at 566.

<sup>510</sup>*Id.* at 571.

<sup>511</sup>*Id.* at 569.

<sup>512</sup>*Id.* at 567-68.

<sup>513</sup>*Id.* at 568 (quoting *United States v. Ford Motor Co.*, 315 F. Supp. 372, 375 (D. Mich. 1970)).

<sup>514</sup>With regard to vertical mergers see, for example, *Fruehauf Corp. v. FTC*, 603 F.2d 345, 359 n.9 (2d Cir. 1979), in which the court was "unwilling to assume that any vertical

the acquisition had actually improved competition in the spark plug market because Autolite, with fifteen percent of the market, would be a more effective rival of Champion and General Motors, each with about thirty percent market shares.<sup>515</sup> Douglas refused to see the benefit, however, summarily rejecting the argument and characterizing the acquisition as “aggravat[ing] an already oligopolistic market.”<sup>516</sup> Today, of course, it is hard to imagine the same result on similar facts.

Overall, Justice Douglas’ expansive use of Section 7 of the Clayton Act to outlaw mergers through use of potential competition, entrenchment, and non-coercive reciprocity theories has indeed been relegated to the antitrust bone yard. Similarly, his sharp dismissal of proposed efficiency gains as ever being relevant in defense of a merger is subject to considerable debate, although the bar remains high for establishing an efficiency defense. He used Section 7 most aggressively in an attempt to protect small business and because of his abhorrence for anything resembling corporate growth or power. Today’s Section 7 focus, by contrast, is on consumer welfare and, as a result, the oftentimes inefficient small business is no longer on the antitrust radar screen. Rather, a working marketplace that provides competition and innovation for the consumer has taken center stage.

## XII. VERTICAL RESTRAINTS

Justice Douglas’ populist view of vertical restraints, last articulated in his 1972 *Ford Motor* opinion, traces at least back to 1948 when he penned his ringing dissent in *Columbia Steel* and wrote for the majority in *United States v. Paramount Pictures, Inc.*<sup>517</sup> It was a close corollary to his distrust of corporate size. Indeed in *Paramount Pictures* he strongly hinted that if it were up to him, vertical integration, at least of the production, distribution and exhibition of motion pictures, would be illegal per se.<sup>518</sup> When reviewing the several restraints present in the case, he frequently focused on the adverse impact on the small, independent competitor as a basis for finding illegality.<sup>519</sup>

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foreclosure lessens competition,” and *Alberta Gas Chemicals Ltd. v. E.I. du Pont de Nemours & Co.*, 826 F.2d 1235 (3d Cir. 1987), *cert. denied*, 486 U.S. 1059 (1988) (virtually rejecting foreclosure theory in principle). See also HOVENKAMP, *supra* note 211, at 386 (“Prevailing judicial opinion now seems to be that vertical mergers should be condemned only in the most extreme circumstances.”).

<sup>515</sup>*Ford Motor Co.*, 405 U.S. at 569-70.

<sup>516</sup>*Id.* at 570.

<sup>517</sup>334 U.S. 131 (1948).

<sup>518</sup>*Id.* at 173-74. Throughout the *Paramount Pictures* opinion Justice Douglas uses the pronoun “we” when referring to the majority for whom he is writing. Only when, however, he notes that vertical integration is not per se illegal does he deviate and refer to the majority by name, “[b]ut the majority of the Court does not take that view. In the opinion of the majority the legality of vertical integration under the Sherman Act turns on . . . .” *Id.* at 174. The message seems clear; he is acquiescing to his brethren on this point.

<sup>519</sup>*Id.* at 162 (“The trade victims of this conspiracy have in large measure been the small independent operators.”).

Even his majority opinion in *White Motor Company v. United States*,<sup>520</sup> which some might view as a moderation of his normal hard line view since he declined to impose the per se rule to vertical territorial restrictions, is rife with his populist perspective.<sup>521</sup> Although he pointed to the Court's lack of experience in this area generally, he noted that vertical territorial restraints may be "the only practicable means a small company has for breaking into or staying in business."<sup>522</sup> Thus, Justice Douglas' seeming reticence to too quickly expand the per se rule is in large part because of his fear that to do so might harm small businesses.<sup>523</sup>

Justice Douglas wrote a special concurrence five years later in *Albrecht v. Herald Co.*, a maximum vertical price fixing case that also involved exclusive dealer territories for newspaper distributors.<sup>524</sup> The majority declined to rule on the exclusive territories issue since that aspect of the case had not gone before the jury.<sup>525</sup> Douglas viewed the case as "therefore close" to *White Motor* but noted that, in determining the legality of a newspaper distributor's exclusive territory, one would normally consider the impact on a newspaper boy who would likely need the protection of an exclusive territory to "wage competitive warfare."<sup>526</sup>

That same term Justice Douglas voted with the majority in the controversial *Schwinn* case, in which the Court announced a per se rule for vertical customer or territorial restrictions when title or dominion of the goods had passed to the distributor or retailer.<sup>527</sup> The decision attempted to resurrect the common law restraint against alienation concept found in the landmark *Dr. Miles* decision of 1911, which made resale price maintenance illegal.<sup>528</sup> It is not at all surprising that Douglas found favor with the majority in *Schwinn*, which seemingly embraced the right of small business to determine its own destiny by determining its price and customers free from manufacturer or supplier interference.<sup>529</sup>

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<sup>520</sup>372 U.S. 253 (1963).

<sup>521</sup>Justice Douglas also declined to impose the rule of reason. The case arose on appeal from summary judgment for the government and the majority believed a trial on the merits was required before a rule of law was "designed." *Id.* at 254, 261.

<sup>522</sup>*Id.* at 263.

<sup>523</sup>In *White Motor*, Justice Black joined Justice Clark's dissent, along with Chief Justice Warren. *Id.* at 275. It is one of the very few times Justices Douglas and Black split in an antitrust case.

<sup>524</sup>390 U.S. 145, 154 (1967) (Douglas, J., concurring).

<sup>525</sup>*Id.* at 153-54.

<sup>526</sup>He noted that here, however, the Court had before it a "large retail enterprise," calling into question the legality of the exclusivity. *Id.* at 155 (Douglas, J., concurring).

<sup>527</sup>*United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). See C. Paul Rogers III, *Restraints on Alienation in Antitrust Law: A Past with No Future*, 49 SMU L. REV. 497 (1996).

<sup>528</sup>*Dr. Miles Med. Co. v. John D. Parks & Sons Co.*, 220 U.S. 373 (1911). Here Justice Douglas parted company with his reputed antitrust mentor, Louis Brandeis, who was opposed to restrictions on resale price maintenance. See BRANDEIS, *supra* note 78, at 243.

<sup>529</sup>See *supra* text accompanying notes 509-14.

Of course, ten years later, or two years after Justice Douglas' retirement, the Burger Court overruled *Schwinn* and installed the rule of reason in vertical non-price cases in the landmark *Continental T.V., Inc. v. GTE Sylvania, Inc.* decision.<sup>530</sup> *Sylvania* (and *Schwinn*) had the effect of rendering *White Motor* and Douglas' concurrence in *Albrecht* moot,<sup>531</sup> since the rule of reason replaced the uncertainty stemming from the lack of judicial experience with vertical non-price restraints in *White Motor*. One might conclude that here Douglas was influential, or at least in the mainstream, since he was reluctant to assert per se rules in this area.<sup>532</sup> Nothing could be further from reality, however, since Douglas' leanings toward the rule of reason were based on his deference to small, independent businesses that should be given every opportunity to compete, while *Sylvania* and later *Khan* were based on efficiency concerns and the promotion of interbrand competition.<sup>533</sup>

Justice Douglas' loyalty to the little guy trying to make it in the business world was early on apparent in his ringing dissent in *Standard Oil Co. of California v. United States*<sup>534</sup> (generally known as *Standard Stations*), in which the Court, per Justice Frankfurter, ruled unlawful exclusive supply contracts required of independent retailers by the oil company defendant. While the Court recognized that requirements contracts provide at least short-term efficiencies for the parties, it concluded that when a substantial share of the market was thereby foreclosed, the contracts violated Section 3 of the Clayton Act.<sup>535</sup>

Although one might assume initially that Justice Douglas was happy with this seemingly anti-efficiency result, he was anything but. He cared not a whit about efficiencies and could not restrain himself from taking a couple of more jabs at the majority opinion in *Columbia Steel*, even though the ink was hardly dry on his dissent there.<sup>536</sup> More to the point, however, he viewed the Court's decision in *Standard Stations* to be a formula that "promises to wipe out large segments of

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<sup>530</sup>*Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

<sup>531</sup>More recently the Court overturned *Albrecht*, holding that vertical maximum price fixing should fall under the rule of reason. *State Oil Co. v. Khan*, 522 U.S. 3 (1997). In doing so, it eradicated one of the worst antitrust opinions in history. See, e.g., William L. Reynolds & Spencer Weber Waller, *Legal Process and the Past of Antitrust*, 48 SMU L. REV. 1811, 1813, 1820 (1995) (labeling *Albrecht* as "awful" and as "tortur[ing] the concept of agreement beyond common sense").

<sup>532</sup>His concurrence in *Albrecht*, however, is quite confusing. He begins by saying *Albrecht* is a rule of reason case. He then states that "[w]hether an exclusive territorial franchise in a vertical arrangement is *per se* unreasonable under the antitrust laws is a much mooted question." *Albrecht v. Herald Co.*, 390 U.S. 145, 154 (1968) (Douglas, J., concurring). He then notes that the majority "quite properly" refuses to say whether such a vertical restraint in the newspaper distribution business is illegal. *Id.*

<sup>533</sup>*Sylvania*, 433 U.S. at 54-55; *Khan*, 522 U.S. at 13-15.

<sup>534</sup>*Standard Oil Co. of Cal. v. United States (Standard Stations)*, 337 U.S. 293, 315 (1949) (Douglas, J., dissenting).

<sup>535</sup>*Id.* at 306-14 (majority opinion).

<sup>536</sup>*Id.* at 318 (Douglas, J., dissenting) ("Under the guise of increased efficiency big business has received approval for easy growth.") (citing *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948)).

independent filling-station operators.”<sup>537</sup> According to Douglas, requirements contracts were necessary to protect small, independent service stations from “service-station empires” by Standard Oil and other oil companies.<sup>538</sup> He viewed the requirements contracts as the lesser of two evils and as superior to vertical integration by the major oil companies because they maintained the viability of the independent service stations.<sup>539</sup> While he recognized that competition between the majors would remain if and when they did integrate, he viewed the majority’s holding as simply legitimizing “the growth of bigness.”<sup>540</sup>

Although *Standard Stations* is certainly subject to criticism as an anti-efficiency holding,<sup>541</sup> Justice Douglas’ dissent does not stand the test of time. He not only ignored the potential efficiencies to independent stations, as did the majority, but he also focused on maintaining the viability of those small independents without any expressed concern about the impact on consumers.<sup>542</sup>

Justice Douglas actually first showed his antipathy for exclusive dealing arrangements four years earlier when he specially concurred in *Associated Press v. United States*.<sup>543</sup> There the Court struck down as an unlawful restraint of trade the Associated Press bylaws that forbade its 1200 newspaper members from selling news to non-members and also granted each member veto power over the entry of non-members.<sup>544</sup> Due to the collective action of AP members through the bylaws, the

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<sup>537</sup>*Id.* at 319. See also *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 154 (1948), in which Justice Douglas, writing for the majority, struck down licensing agreements between motion picture distributors and theatre “circuits” because “they eliminate the opportunity for the small competitor to obtain the choice first runs, and put a premium on the size of the circuit. They are, therefore, devices for stifling competition and diverting the cream of the business to the large operators.” *Id.*

<sup>538</sup>*Standard Stations*, 337 U.S. at 320 (Douglas, J., dissenting).

<sup>539</sup>Justice Douglas lamented that “[t]he small, independent business man will be supplanted by clerks.” *Id.* at 321.

<sup>540</sup>*Id.* at 320-21.

<sup>541</sup>See, e.g., William B. Lockhart & Howard R. Sacks, *The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act*, 65 HARV. L. REV. 913, 922 (1952).

<sup>542</sup>Compare Countryman, *supra* note 88, at 367, arguing that Justice Douglas’ dissent in *Standard Stations* shows that Douglas was not simply a “hopeless” anti-bigness “doctrinaire [sic].” Professor Countryman, a former Justice Douglas law clerk, was regarded, along with Professor Fred Rodell of Yale, as Douglas’ principal academic defender and champion. See Skeel, *supra* note 21, at 1105-06; see also Vern Countryman, *Scholarship and Common Sense*, 93 HARV. L. REV. 1407 (1980); Vern Countryman, *Search and Seizure in a Shambles? Recasting Fourth Amendment Law in the Mold of Justice Douglas*, 64 IOWA L. REV. 435 (1979); Vern Countryman, *Justice Douglas and Freedom of Expression*, 1978 U. ILL. L.F. 301 (1978); Vern Countryman, *The Contribution of the Douglas Dissents*, 10 GA. L. REV. 331 (1976); Vern Countryman, *Justice Douglas: Expositor of the Bankruptcy Law*, 16 UCLA L. REV. 773 (1969); Fred Rodell, *Bill Douglas: American*, 61 AM. MERCURY 656 (1945).

<sup>543</sup>*Associated Press v. United States*, 326 U.S. 1, 23 (1945) (Douglas, J., concurring).

<sup>544</sup>Justice Black wrote the majority opinion, one of the few times he was not on all fours with Justice Douglas in antitrust cases. *Id.* at 3 (majority opinion). See also *White Motor Co. v. United States*, 372 U.S. 253, 275 (1963) (Clark, J., dissenting).

majority treated the case as a concerted refusal to deal or boycott case, expressly stating that it involved more than a simple exclusive agreement between two newspapers or a reporter and a newspaper.<sup>545</sup>

In his concurrence, Justice Douglas felt compelled to discuss “the narrow compass” of the decision “in view of the broader issues which have been injected into the discussion.”<sup>546</sup> His was, in essence, a slippery slope argument. While he acknowledged that a Seattle newspaper and a New York newspaper could agree to furnish local news exclusively to each other, he noted that “such an exclusive arrangement, though innocent standing alone, might be part of a scheme which would violate the Sherman Act . . . .”<sup>547</sup> That, he asserted, was what had occurred in the case before the Court.<sup>548</sup>

Five years after *Standard Stations*, Justice Douglas wrote for a 7-2 majority in *FTC v. Motion Picture Advertising Service Co.*,<sup>549</sup> a little known and completely ignored case that is noteworthy only for being one of Justice Douglas’ worst opinions. *Motion Picture Advertising* was an exclusive dealing case brought under Section 5 of the Federal Trade Commission Act. In a decision highly suspect by contemporary exclusive dealing standards,<sup>550</sup> Douglas struck down the exclusive dealing contracts of an advertising motion picture producer/distributor with theaters.<sup>551</sup> According to the Court, the defendant had exclusive dealing contracts with almost forty percent of the theaters in its areas of operation, with the majority of the contract terms ranging from one to two years.<sup>552</sup> The Court found it significant that three competing distributors, all separately sued, also did business via exclusive contracts and that collectively seventy-five percent of available outlets for the films were under exclusive distribution agreements.<sup>553</sup>

<sup>545</sup>*Associated Press*, 326 U.S. at 14.

<sup>546</sup>*Id.* at 23 (Douglas, J., concurring).

<sup>547</sup>*Id.*

<sup>548</sup>In so stating, Justice Douglas seemingly downplayed the collective nature of the restraint while the majority opinion emphasized that without the collective action of the AP members, a very different case would have presented itself. *Id.* at 14 (majority opinion).

<sup>549</sup>*FTC v. Motion Picture Adver. Serv. Co.*, 344 U.S. 392 (1953).

<sup>550</sup>*See, e.g.,* *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 486 U.S. 2, 45-46 (1984) (O’Connor, J., concurring); *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 595 (1st Cir. 1993); *Chuck’s Feed & Seed Co. v. Ralston Purina Co.*, 810 F.2d 1289 (4th Cir. 1987); *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 393 (7th Cir. 1984).

<sup>551</sup>Advertising motion pictures were in effect advertisements that theaters ran in addition to the featured motion picture.

<sup>552</sup>Some contracts ran for up to five years. *Motion Picture Adver.*, 344 U.S. at 393.

<sup>553</sup>*Id.* at 395. No conspiracy among the distributors was charged, thus each had to be sued individually. *Id.* at 398.

Justice Frankfurter, who often was at odds with Justice Douglas,<sup>554</sup> vigorously dissented, joined only by Justice Burton.<sup>555</sup> He characterized the Commission and the majority's conclusion that the use of exclusive contracts constituted an unreasonable restraint of trade as "dogmatic" and took issue with Douglas' reliance upon the seventy-five percent collective market foreclosure absent a Sherman Act conspiracy or concerted action charge.<sup>556</sup> Lamenting the lack of specificity in the record, Frankfurter noted that apparently more than one-half of the contracts ran for only one year.<sup>557</sup> Since the Commission's finding was directed to exclusive contracts of more than one year's duration, he concluded that the majority's affirmation of the Commission was really based on defendant's "hold" over about six percent of the theaters in the country or about ten percent of the theaters that accepted advertising.<sup>558</sup>

Justice Douglas did not attempt to rely on the *Standard Stations* case or any other for that matter.<sup>559</sup> He did note that "[t]he vice of the exclusive contract in this particular field is in its tendency to restrain competition and to develop a monopoly" but provided little explanation how either could occur on the facts before the Court.<sup>560</sup> Instead, in broadly deferring to the FTC's determination of what constitutes "unfair methods of competition" under Section 5 of the FTC Act, Douglas provided a misleading summary of the market (without attempting to define what the market was) and mischaracterized the nature and length of the exclusive contracts at issue. Indeed, if he was trying to protect some group of competitors, as was his want, it is unclear who they were—the theaters that had their choice of at least three other advertising film vendors under one year exclusive agreements and

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<sup>554</sup>See, e.g., *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948). On the friction and animosity between Justices Douglas and Frankfurter, see, for example, MURPHY, *supra* note 10, at 187, 300-01, PHILLIP J. COOPER, *BATTLES ON THE BENCH: CONFLICT INSIDE THE SUPREME COURT* 25-27, 40-41, 69-70, 72-73, 80-81, 95, 108-10, 112, 133-35, 145-46 (1995), and BRUCE ALLEN MURPHY, *THE BRANDEIS/FRANKFURTER CONNECTION* 261-68 (1982).

<sup>555</sup>*Motion Picture Adver.*, 344 U.S. at 398 (Frankfurter, J., dissenting).

<sup>556</sup>*Id.* at 399.

<sup>557</sup>*Id.* at 398.

<sup>558</sup>*Id.* at 399. Justice Douglas' forty percent market foreclosure figure was based on the area in which the defendant did business, which, of course, may or may not have been the relevant geographic market. *Id.* at 393 (majority opinion).

<sup>559</sup>Justice Frankfurter, however, made a point of differentiating *Standard Stations*, pointing out, for example, that the bargaining power of the seller *vis-a-vis* the buyers in the two cases varied greatly. In *Standard Stations* the retail gas stations were dependant on their supplier for gasoline. In *Motion Pictures Advertising*, however, films containing advertising were not the central business of theaters and accounted for only a small portion of their revenues. It was thus unlikely that the defendant had any real bargaining power over its theater customers. *Id.* at 402 (Frankfurter, J., dissenting).

<sup>560</sup>*Id.* at 397. There were no allegations of conspiracy among the four advertising film distributors. There was also a complete lack of relevant market analysis or market share statistics. In other words, Justice Douglas expected one to take it on faith that exclusive dealing contracts restrained competition and developed monopoly power.



that certainly had substantial bargaining power, or perhaps other unnamed advertising film vendors seeking to break into the market. Either way, consumers, in this case, moviegoers, were little impacted by which advertisements they had to sit through to see the movie of their choice.<sup>561</sup>

Seven years later Justice Douglas again dissented in an exclusive dealing case, *Tampa Electric Co. v. Nashville Coal Co.*<sup>562</sup> This time, however, he disagreed with the majority's reversal of the lower court's determination that the contracts at issue were unreasonable restraints of trade. His joint dissent with Justice Black simply stated that they were of the opinion that the lower courts had gotten it right and thus should be affirmed.<sup>563</sup>

At issue was a requirements contract in which the Nashville Coal Company entered into a twenty-year agreement to supply an electric utility with its coal requirements, with a stated minimum.<sup>564</sup> The utility sought declaratory relief but the Supreme Court viewed the market foreclosure as too insignificant to run afoul of the rule of reason, even if the relevant line of commerce was bituminous coal.<sup>565</sup> The lower courts, in contrast, had focused on coal consumption in "[p]eninsular Florida," 700,000 tons previously as opposed to an expected 1,000,000 tons under the requirements contract at issue, rather than the sources of supply for those needs, which numbered 700 producers in seven states.<sup>566</sup> Thus, the majority viewed the market foreclosure from the suppliers' perspective rather than just focusing on the quantity of the demand.

What, then, were Justices Douglas and Black thinking? *Tampa Electric* appears to be an easy case, viewed from forty-plus years forward. Most likely, the justices were concerned about the foreclosure of rival coal producers from selling to Tampa Electric for the twenty-year life of the contract.<sup>567</sup> But today the case would likely be viewed as enhancing efficiency and keeping energy costs down by providing both seller and buyer with long term market guarantees. Given the very small market foreclosure, even if coal is considered the relevant product, most antitrust lawyers would counsel against even bringing the case today.

Three years after *Tampa Electric*, Justice Douglas was again able to garner a majority to protect independent retailers in *Simpson v. Union Oil Co. of*

<sup>561</sup>Most, presumably, would have preferred not to sit through any advertising films at all.

<sup>562</sup>*Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 335 (1961) (Black, J. & Douglas, J., dissenting).

<sup>563</sup>*Id.*

<sup>564</sup>*Id.* at 321 (majority opinion).

<sup>565</sup>Because coal for consumption in Tampa, the location of the utility, came from seven states, the market foreclosure caused by the requirements contract at issue was less than one percent. *Id.* at 333.

<sup>566</sup>*Id.* at 330. The Court noted that coal accounted for less than six percent of the fuel consumed in Florida (oil and natural gas predominating) but was willing to consider coal as the relevant line of commerce. *Id.* at 330, 331 n.8.

<sup>567</sup>At least that was the concern of the Sixth Circuit. See *Tampa Elec. Co. v. Nashville Coal Co.*, 276 F.2d 766, 771 (6th Cir. 1960). That court did recognize that requirements contracts "may well be of economic advantage to buyers as well as to sellers." *Id.*

California.<sup>568</sup> This time he found consignment sales unlawful. In doing so, he seemingly overruled a forty-year-old precedent<sup>569</sup> and created confusion that the lower courts are still sorting out.<sup>570</sup>

Simpson was a Union Oil retail gas station lessee. It sued, complaining of its consignment agreement with Union whereby Union set the retail prices of gasoline consigned to it. In reversing the Court of Appeals, Justice Douglas labeled the consignment arrangement, coupled with the station lease, "coercive"<sup>571</sup> since it "depriv[ed] independent dealers of the exercise of free judgment whether to become consignees at all, or remain consignees, and, in any event, to sell at competitive prices."<sup>572</sup> Although he recognized that consignments "perform an important function in trade and commerce,"<sup>573</sup> his focus was on the "nominal 'consignees' who are in reality small struggling competitors seeking retail gas customers."<sup>574</sup>

In his zeal to protect the independent retailer, Justice Douglas was not put off by the 1926 *United States v. General Electric Co.*<sup>575</sup> precedent, which had permitted the defendant to set prices on consigned goods. While acknowledging that *General Electric* was not limited to patented goods,<sup>576</sup> Douglas nonetheless treated *General Electric* as if it were and held that it was "not apposite to the special facts here."<sup>577</sup> In dissent, Justice Stewart was dumbfounded, calling Douglas' distinction of *General Electric* "specious" and asserting that the majority had in effect overruled a doctrine that had stood unquestioned for almost forty years.<sup>578</sup> The majority had

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<sup>568</sup>*Simpson v. Union Oil Co. of Cal.*, 377 U.S. 13 (1964).

<sup>569</sup>*United States v. Gen. Elec. Co.*, 272 U.S. 476 (1926).

<sup>570</sup>*See, e.g., Ill. Corporate Travel, Inc. v. Am. Airlines*, 806 F.2d 722, 725 (7th Cir. 1986), *after remand*, 889 F.2d 751, 752-53 (7th Cir. 1989), *cert. denied*, 495 U.S. 919 (1990); *Ryko Mfg. Co. v. Eden Servs.*, 823 F.2d 1215 (8th Cir. 1987), *cert. denied*, 484 U.S. 1026 (1988).

<sup>571</sup>*Simpson*, 377 U.S. at 17.

<sup>572</sup>*Id.* at 16.

<sup>573</sup>*Id.* at 17.

<sup>574</sup>*Id.* at 21. Justice Douglas also expressed concern that consignment "device" would result in the fixing of retail prices because of Union's "vast" distribution system. *Id.*

<sup>575</sup>*General Electric*, 272 U.S. 476.

<sup>576</sup>In *General Electric*, Chief Justice Taft had specifically held that "[t]he owner of an article, patented or otherwise, is not violating the common law, or the Anti-Trust law, by seeking to dispose of his article directly to the consumer and fixing the price by which his agents transfer the title from him directly to such consumer." *Id.* at 488.

<sup>577</sup>*Simpson*, 377 U.S. at 23. Specifically, Justice Douglas wrote: The Court in the *General Electric* case did not restrict its ruling to patented articles; it, indeed, said that the use of the consignment device was available to the owners of articles "patented or otherwise." But whatever may be said of the *General Electric* case on its special facts, involving patents, it is not apposite to the special facts here. *See also* Kauper, *supra* note 211, at 340 (describing the distinction of *General Electric* "far too transparent").

*Id.*

<sup>578</sup>*Simpson*, 377 U.S. at 30 (Stewart, J., dissenting). Justice Stewart noted that the existence of a patent had no bearing on whether a consignor can control the price at which a

taken this drastic step, he noted, even though neither party had challenged the validity of *General Electric* in their briefs or oral argument.<sup>579</sup>

In retrospect, one can see that the Union Oil Company stood little chance against Justice Douglas in *Simpson*. The facts of the case presented a double whammy for the defendant and allowed Douglas to protect the small business consignee and restrict the reach of patent-holder rights in one fell swoop. The decision in *Simpson* also, as Justice Stewart predicted,<sup>580</sup> created a good deal of uncertainty in the law. For example, later, after GE's patents had expired, a federal district court held that the GE consignment system was illegal per se.<sup>581</sup>

More recent decisions have focused on language in the original *General Electric* decision,<sup>582</sup> differentiating between a consignment to a true agent or representative of the seller and what amounts to a sale of the consigned goods to the consignee at the time of the consignment.<sup>583</sup> More recently, in *Business Electronics Corp. v. Sharp Electronics Corp.*,<sup>584</sup> the Supreme Court verified the so-called agency exception to vertical price fixing's then per se rule, thus giving the lower courts more ammunition with which to distinguish *Simpson*.<sup>585</sup>

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consignee sells because the consignor's right to set the price derives solely from its ownership of the goods.

<sup>579</sup>*Id.* at 29.

<sup>580</sup>*Id.* at 30.

<sup>581</sup>*United States v. Gen. Elec. Co.*, 358 F. Supp. 731 (S.D.N.Y. 1973).

<sup>582</sup>*United States v. Gen. Elec. Co.*, 272 U.S. 476, 485 (1926) ("The validity of the Electric Company's scheme of distribution turns . . . on the question of whether the sales are by the company through its agents to the consumer, or are in fact by the company to the so-called agents at the time of consignment. The distinction in law and in fact between an agency and a sale is clear.").

<sup>583</sup>*See, e.g.*, *Ill. Corporate Travel, Inc. v. Am. Airlines*, 806 F.2d 722, 725 (7th Cir. 1986), *after remand*, 889 F.2d 751, 752-53 (7th Cir. 1989), *cert. denied*, 495 U.S. 919 (1990) (holding travel agents are air carriers' agents, thus carriers' price restrictions are lawful); *Belfiore v. N.Y. Times Co.*, 826 F.2d 177, 182 (2d Cir. 1987), *cert. denied*, 484 U.S. 1067 (1988) (finding consignment where publisher paid newspaper distributors on a per paper sold basis and picked up unsold newspapers the following day); *Kowalski v. Chi. Tribune Co.*, 854 F.2d 168 (7th Cir. 1988); *Ryko Mfg. Co. v. Eden Servs.*, 823 F.2d 1215, 1224 (8th Cir. 1987), *cert. denied*, 484 U.S. 1026 (1988) (finding consignment for independent distributor which sold custom made car washes); *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430 (7th Cir. 1986) (holding consignment "exception" should apply only if manufacturer bears an unusually high proportion of the risk of nonsale).

<sup>584</sup>*Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 733 (1988) (per se vertical pricing fixing rule "does not apply to restrictions on price to be charged by one who is in reality an agent of . . . the manufacturer").

<sup>585</sup>Lower courts had long found that *Simpson* did not outlaw purported consignments in large distribution networks as long as an actual agent was utilized. *See, e.g.*, *Mesirow v. Pepperidge Farm, Inc.*, 703 F.2d 339 (9th Cir. 1983), *cert. denied*, 464 U.S. 820 (1983); *Hardwick v. Nu-Way Oil Co.*, 589 F.2d 806, 809 (5th Cir. 1979), *rehearing denied*, 592 F.2d 1190 (5th Cir. 1979), *cert. denied*, 444 U.S. 836 (1979); *Pogue v. Int'l Indus., Inc.*, 524 F.2d 342 (6th Cir. 1975).

In *Simpson*, Justice Douglas did recognize the agency distinction<sup>586</sup> but failed to emphasize it and obfuscated the issue by focusing on the coercive element of Union Oil's consignments to its dealers.<sup>587</sup> Arguably the Justice's antipathy toward the rights of patent holders unduly influenced his dismissal of *General Electric*. Ironically, Douglas could *more easily* have avoided limiting *General Electric* to patent holders and achieved the same result in *Simpson* because *General Electric* does require a real agency for antitrust immunity, a requirement that was not present in *Simpson*.

Instead Justice Douglas took on *General Electric* even though that decision expressly failed to limit its holding to consignments involving patents.<sup>588</sup> Thus, Douglas' handling of *Simpson* suggests more than bias but perhaps intellectual dishonesty.<sup>589</sup> He certainly understood that he could achieve the result he desired without limiting *General Electric*, but that would eliminate the opportunity presented to take a swipe at the scope of intellectual property rights for which he had such disdain.<sup>590</sup>

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<sup>586</sup>One who sends a rug or a painting or other work of art to a merchant or a gallery for sale at a minimum price can, of course, hold the consignee to the bargain . . . . When, however, a 'consignment' device is used to cover a vast gasoline distribution system, fixing prices through many retail outlets, the antitrust laws prevent calling the "consignment" an agency . . . .  
*Simpson*, 377 U.S. at 18, 21.

<sup>587</sup>Justice Douglas provides little guidance about what constitutes coercion, stating that "it matters not what the coercive device is." *Id.* at 17. Although *Simpson* seems to leave open the potential for a finding of any supplier's attempt to impose prices on a consignee as coercive, the lower federal courts have tended to distinguish *Simpson* on the coercion issue. See, e.g., *Mesirow*, 703 F.2d 339, *cert denied*, 464 U.S. 820. See also Rudolph J. Peritz, *A Genealogy of Vertical Restraints Doctrine*, 40 HASTINGS L.J. 511, 535 (1989); Rogers, *supra* note 527, at 514-15.

<sup>588</sup>Meaning presumably, as Justice Stewart pointed out in dissent, that *General Electric* would seem to apply to consignments of non-patented goods.

<sup>589</sup>See William F. Baxter, *The Viability of Vertical Restraints Doctrine*, 75 CAL. L. REV. 933, 935 (1987) (stating that the Court in *Simpson* eliminated the agency device, and characterizing the decision as "one of the most dishonest opinions of all time in a field with many serious contenders . . ."); Kauper, *supra* note 211, at 340 (*Simpson* used as illustration of a decision which "lacked candor"). Recent evidence documents that Justice Douglas was less than veracious in his personal life, often embellishing or even fabricating events, including exaggerating his academic record at Columbia. In fact, late in his life, his Columbia classmates began referring to the Justice as "the Approximate Mr. Justice Douglas" due to his penchant for changing his own history, including his supposed class rank. See, e.g., MURPHY, *supra* note 10, at 474.

<sup>590</sup>In an earlier concurrence, Justice Douglas had advocated overruling *General Electric*. *United States v. Line Material Co.*, 333 U.S. 287, 316 (1948) (Douglas, J., concurring) ("I would be rid of *United States v. General Electric Co.* My reasons for overruling it start with the Constitution itself."). Taking the easier course in *Simpson* may have also reduced the likelihood of defections among his brethren, such as occurred with Justices Stewart, Brennan and Goldberg. For a far less controversial distinction of *General Electric* by Justice Douglas, see *United States v. Masonite Corp.*, 316 U.S. 265, 276-81 (1942) (licensing agreements among patent holders, which restricted price competition, was not protected by *General Electric*).

*Simpson* is a triumph of competition policy against both intellectual and common law property rights.<sup>591</sup> Irrespective of the wisdom of that, the problem, as with most of Justice Douglas' antitrust work, is that the competition policy *Simpson* sets forth is anti-consumer and indeterminate at best and incoherent at worst.<sup>592</sup>

Justice Douglas seemingly painted the Warren Court into a corner in the now overruled *Schwinn* decision, in which the Court reasserted the importance of title in antitrust analysis, distinguishing between bicycles consigned and sold to authorized dealers.<sup>593</sup> The former was to be judged under the rule of reason because of the constraints of the ancient rule against alienation while the latter was judged to be inherently anticompetitive and per se illegal. But what of *Simpson*, decided only three years earlier? The majority, in an opinion written by Douglas protégé Abe Fortas and joined by Douglas, virtually ignored it, citing it only for the proposition that "unreasonably restrictive" agencies or consignments violate Section 1.<sup>594</sup>

In sum, one can only conclude that Justice Douglas' impact in the vertical restraints area has been almost completely erased. Happily, the Court overruled *Albrecht* in its *Khan* decision, which instituted the rule of reason for maximum resale price maintenance. More recently, the Court in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,<sup>595</sup> did away with the per se rule for resale price minimums and overruled *Dr. Miles*, another Douglas favorite. On the negative side, his opinion in *Simpson* remains as a potential significant roadblock to modern antitrust analysis. One might point to his *White Motor* decision as having a continuing impact, as it is often cited for the proposition that courts should not too quickly adopt per se rules. It does not withstand contemporary scrutiny, however, because Douglas avoided the per se rule only to protect the viability of small companies. And in *Tampa Electric*, the one other Warren Court decision in the vertical restraints arena that retains modern vitality, he dissented and voted for liability on facts that today likely would not survive a motion to dismiss.

### XIII. THE ROBINSON-PATMAN ACT

Justice Douglas' term on the Supreme Court virtually paralleled the first forty years of the Robinson-Patman Act, which was passed in 1936 as an amendment to the Clayton Act.<sup>596</sup> Critics have long criticized the Act, which prohibits price discrimination in certain scenarios, as a protectionist measure similar to the

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<sup>591</sup>See PERITZ, *supra* note 47, at 204 (by elevating competition over the right of consignment, the Court "shook loose a cornerstone of common-law property rights secure for three hundred years . . .").

<sup>592</sup>See, e.g., Rogers, *supra* note 527, at 515.

<sup>593</sup>United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

<sup>594</sup>*Id.* at 380. Neither opinion contained any market analysis. *Schwinn* made no effort to distinguish *Simpson* on its facts (e.g. the relevance of the lack of coercion) and thus *Simpson* remained an indeterminate precedent. For criticism of that aspect of *Schwinn*, see for example Kauper, *supra* note 211, at 340-41 (*Simpson* and *White Motor* were "treated in an almost inexplicable manner in *Schwinn*."). See also Page, *supra* note 33, at 34.

<sup>595</sup>Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007).

<sup>596</sup>15 U.S.C. §§ 13-13b, 21a (1976).

discarded fair trade laws.<sup>597</sup> Even more criticism has been levied at the interpretation and enforcement of the Act, beginning with the FTC and ending with the Supreme Court.<sup>598</sup>

Unsurprisingly, since the Act favors small, independent businesses, Justice Douglas was a strident advocate of its enforcement and always sided with the government or plaintiff. For example, Justice Douglas voted with the majority in the heavily criticized *Utah Pie* decision<sup>599</sup> which protected a local company with a nearly dominant market share against larger companies seeking to enter the local market. In doing so, the Court equated below cost pricing with the predatory intent requisite to establish primary line, i.e., seller, injury but gave no guidance as to how one would determine "cost."<sup>600</sup> Earlier, Justice Douglas was also in the majority in *FTC v. Morton Salt Co.*,<sup>601</sup> a controversial decision in which the Court ruled that a price discrimination affecting competing buyers was in essence prima facie evidence of competitive injury to the disfavored buyer.<sup>602</sup>

Of course, the Robinson-Patman Act did provide a ready-made platform for Justice Douglas to pontificate about the rights of small business and the evils of monopoly power. For example, he vigorously dissented in *Automatic Canteen Co. v.*

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<sup>597</sup>In general, the Robinson-Patman Act prohibits price discrimination, which often harms smaller buyers and disallows volume discounts that cannot be cost justified. As such, it tends to "protect" the small, independent purchaser of commodities against the buying power of large chain stores. See generally ROGERS, ET AL., *supra* note 106, at 1177-80; BORK, *supra* note 454, at 382-401; EARL W. KINTNER, A ROBINSON-PATMAN PRIMER 8-11 (2d ed.1979); FREDERICK M. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 3-11 (1962); CORWIN EDWARDS, THE PRICE DISCRIMINATION LAW 2-5 (1959).

<sup>598</sup>See, e.g., 1 AMERICAN BAR ASSOCIATION ANTITRUST SECTION MONOGRAPH NO. 4, THE ROBINSON-PATMAN ACT: POLICY AND LAW, 3 (1980); Edward F. Howrey, et al., *The Robinson-Patman Act: How—Not Whether—It Should Be Amended*, 22 REC. N.Y.C. B.A. 621 (1967); Philip Elman, *The Robinson-Patman Act and Antitrust Policy: A Time for Reappraisal*, 42 WASH. L. REV. 1 (1966); Davis W. Morton, Jr. & Albert H. Cotton, *The Robinson-Patman Act—Antitrust or Anti-Consumer*, 37 MINN. L. REV. 227 (1953); Frederick M. Rowe, *Price Discrimination, Competition, and Confusion*, 60 YALE L.J. 929 (1951).

<sup>599</sup>*Utah Pie Co. v. Cont'l Baking Co.*, 386 U.S. 685 (1967).

<sup>600</sup>For criticisms of *Utah Pie*, see Daniel J. Gifford, *Primary-Line Injury Under the Robinson-Patman Act: The Development of Standards and the Erosion of Enforcement*, 64 MINN. L. REV. 1 (1979), Kenneth G. Elzinga & Thomas F. Hogarty, *Utah Pie and the Consequences of Robinson-Patman*, 21 J.L. & ECON. 427 (1978), and Ward Bowman, *Restraint of Trade by the Supreme Court: The Utah Pie Case*, 77 YALE L.J. 70 (1967).

<sup>601</sup>*FTC v. Morton Salt Co.*, 334 U.S. 37 (1948).

<sup>602</sup>At issue were discounts in salt given to grocery chains that purchased large quantities. The Court affirmed the FTC's finding of proof of a reasonable probability of competitive injury even though salt purchases and sales made up a very small portion of a grocery store's business. *Id.* at 48-49. For a more contemporary applications of the *Morton Salt* rule, see *Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 191-93 (1st Cir. 1996), *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1447, n.18 (9th Cir. 1995), and *Stelwagon Manufacturing Co. v. Tarmac Roofing Systems, Inc.*, 63 F.3d 1267, 1271 (3d Cir. 1995). See also Paul H. LaRue, *The Robinson-Patman Act in the Twenty-First Century: Will the Morton Salt Rule Be Retired?*, 48 SMUL REV. 1917 (1995).

FTC,<sup>603</sup> a case in which the majority restricted the reach of Section 2(f) of the Act, which makes it illegal for a buyer to knowingly induce or receive illegal price discrimination.<sup>604</sup> The Court held that the Section 2(f) knowledge requirement meant that the favored buyer must know that the lower price it induced or received was not cost justified for a violation to occur.<sup>605</sup> It further held that evidence that the favored buyer knew that its price was lower was not sufficient to shift the burden of proof to the buyer to prove the seller's cost justification or other defenses.<sup>606</sup>

Justice Douglas emphatically disagreed both as a matter of statutory interpretation and as a matter of policy.<sup>607</sup> In his view the majority was, in essence, catering to the ability of large buyers to coerce suppliers into granting discriminatory low prices.<sup>608</sup> He noted that "[t]here is no doubt that the large buyers wield clubs that give them powerful advantages over the small merchants."<sup>609</sup> He believed that the language of Section 2(f) as well as the legislative history required that the "bludgeon[ing]" buyer "show that the privileges he demanded had cost justifications."<sup>610</sup>

Justice Douglas also published a concurring opinion in *United States v. Borden Co.*,<sup>611</sup> a case in which the Court significantly narrowed the application of the cost justification defense by requiring the showing of actual cost differences to justify price discrimination. According to Douglas, however, the majority had not gone far enough. He believed that when no centralized purchasing by a large price favored chain was involved, cost differentials could be justified only on a store-by-store basis.<sup>612</sup> "Otherwise those with the most prestige get the largest discounts and the independent merchants are more and more forced to the wall."<sup>613</sup>

Justice Douglas went on to say that the purpose of the Robinson-Patman Act is "to control practices that lead to a monopoly and an impoverishment of our middle class."<sup>614</sup> He viewed restricting the cost justification defense as necessary to "preserve . . . as much of our traditional free enterprise as possible" because "[f]ree

<sup>603</sup>*Automatic Canteen Co. v. FTC*, 346 U.S. 61 (1953).

<sup>604</sup>15 U.S.C. § 13(f) (1976).

<sup>605</sup>Or, in Justice Frankfurter's famous double negative, "not known by him not to be within one of those defenses." *Automatic Canteen Co.*, 346 U.S. at 74.

<sup>606</sup>*Id.* at 78-79.

<sup>607</sup>*Id.* at 82 (Douglas, J., dissenting) (joined by Justices Black and Reed).

<sup>608</sup>*Id.* at 83-84.

<sup>609</sup>*Id.* at 84.

<sup>610</sup>He thought it unfair that, as mandated by the majority, the FTC was obliged to prove that the price discrimination was not cost justified as well as "what lay in the buyer's mind." *Id.* at 85.

<sup>611</sup>*United States v. Borden Co.*, 370 U.S. 460 (1962).

<sup>612</sup>*Id.* at 475 (Douglas, J., concurring).

<sup>613</sup>*Id.*

<sup>614</sup>*Id.*

enterprise is not free when monopoly power is used to breed more monopoly.”<sup>615</sup> In his view, price discounts and price cutting led to “the aggrandizement of power by the chains and the ploughing under of the independents. The antitrust laws . . . were designed to avert such an inquest on free enterprise.”<sup>616</sup>

Thus, Justice Douglas’ concurrence in *Borden* succinctly summarized much of his views of antitrust policy. It displayed his antithesis and perhaps paranoia to even the idea of monopoly power, irrespective of any market share data or any factual basis to support such a claim.<sup>617</sup> Likewise, his zeal to protect small business overshadowed any recognition that price discounts potentially benefit consumers and may simply be indicia of vigorous price competition.<sup>618</sup>

Somewhat surprisingly, given his position in *Morton Salt* and later in *Automatic Canteen* and *Borden*, Justice Douglas joined the majority in the 1951 *Standard Oil Co. v. FTC* decision,<sup>619</sup> in which a divided Court ruled that the “good faith” standard of the Act’s meeting competition defense<sup>620</sup> provided an absolute defense rather than merely a rebuttable presumption. The decision broadened the defense considerably and cleared up confusion from the earlier *FTC v. A.E. Staley Mfg. Co.* decision,<sup>621</sup> in which the Court was unclear whether “good faith” was a substantive or procedural requirement.<sup>622</sup> Douglas also was with the majority in *FTC v. Sun Oil Co.*,<sup>623</sup> a decision, however, that restricted the meeting competition defense to meeting the price of the discriminating seller’s competitor.<sup>624</sup>

In *Nashville Milk Co. v. Carnation Co.*,<sup>625</sup> Justice Douglas objected to what he perceived was the narrowing of the right of private enforcement of the Robinson-Patman Act, leading a four-justice dissent over the question of whether a private

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<sup>615</sup>*Id.*

<sup>616</sup>*Id.* at 475-76.

<sup>617</sup>The *Borden* opinion is devoid of any market share data for the favored or disfavored groceries. It does state that the A&P and Jewel chains had 254 stores combined, compared to 1,322 independent stores, and that the defendant’s volume discounts in favor of the chains, created two classes of customers. *Id.* at 465.

<sup>618</sup>Of course, the Robinson-Patman Act is designed to do just that: protect small business against price competition. Lower prices are actually made illegal if the product of a price discrimination competitively injures a disfavored buyer.

<sup>619</sup>*Standard Oil Co. v. FTC*, 340 U.S. 231 (1951).

<sup>620</sup>15 U.S.C. § 13(b) (1976).

<sup>621</sup>*FTC v. A.E. Staley Mfg.*, 324 U.S. 746, 759-60 (1945). Justice Douglas was in the majority of the 7-0 decision with Justice Jackson concurring in the result without an opinion.

<sup>622</sup>See 1 MONOGRAPH NO. 4, *supra* note 598, at 119.

<sup>623</sup>*FTC v. Sun Oil Co.*, 371 U.S. 505 (1963).

<sup>624</sup>The *Sun Oil* decision held that the meeting competition defense does not enable a seller to reduce its price for one buyer to enable that buyer to meet the lower price of one of its competitors. Rather, the Court concluded “that [Section] 2(b) of the Act contemplates that the lower price which must be met by one who would discriminate must be the lower price of his own competitor . . .” *Id.* at 529.

<sup>625</sup>*Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373 (1958).



right of action accrued under Sections 4 and 16 of the Clayton Act for violations of Section 3 of the Robinson-Patman Act.<sup>626</sup> The majority held that Section 3, which criminalized price discriminations when “an unreasonably low price” and predatory intent are involved, was separate and apart from the rest of the Robinson-Patman Act, which was an amendment to the Clayton Act.<sup>627</sup> Since the private rights of action under Sections 4 and 16 accrue only for violations of the Sherman and Clayton Acts, those sections did not apply to the stand-alone Section 3 of the Robinson-Patman Act.<sup>628</sup>

Justice Douglas in dissent disagreed with the majority’s reading of the legislative history of the Act, particularly since the type of price discrimination targeted under Section 3 is more onerous than that of Section 2(a) for which the treble damage remedy certainly applies.<sup>629</sup> He lamented, further, that the Court’s decision effectively repealed Section 3, since the Department of Justice had never attempted to enforce the criminal statute. He was, it turns out, pretty much correct.<sup>630</sup>

During his long tenure, Justice Douglas also joined the majority in two cases which assured a liberal application of Sections 2(d) and 2(f) of the Act, which prohibit sellers from discriminatorily providing buyers with advertising allowances or sales promotional services.<sup>631</sup> In *FTC v. Henry Broch & Co.*,<sup>632</sup> however, Douglas wrote for a 5-4 majority and, perhaps to gain that slim majority, greatly narrowed Section 2(c) of the Act, which outlaws the so-called “dummy” brokerage practices of large buyers who would allegedly refuse to deal through independent brokers or middlemen.<sup>633</sup>

The section was designed to deal with situations in which a seller paid a brokerage fee to an intermediary controlled by the buyer or allowed a direct buyer a discount because a broker’s services were not utilized.<sup>634</sup> Prior to the *Henry Broch &*

<sup>626</sup>15 U.S.C. § 13(a) (1976).

<sup>627</sup>*Nashville Milk*, 355 U.S. at 377.

<sup>628</sup>*Id.* at 378-79. Section 3 was originally the Borah-Van Nuys Bill which was introduced by opponents of the Robinson-Patman Act in an effort to logjam its passage. The Senate tacked the bills together and passed both. However, Section 3 was not made part of the Clayton Act, perhaps because it is a criminal statute and thus enforceable only by the Justice Department, whereas the DOJ and FTC otherwise have joint enforcement responsibilities for the Clayton Act. See ROGERS, ET AL., *supra* note 106, at 1288-89.

<sup>629</sup>*Nashville Milk*, 355 U.S. at 383-84 (Douglas, J., dissenting).

<sup>630</sup>The Department of Justice did pursue one Section 3 case to the Supreme Court, where the statute withstood a challenge that it was unconstitutionally vague. *United States v. Nat’l Dairy Prods. Corp.*, 372 U.S. 29 (1963). Justice Douglas voted with the 6-3 majority. Since *National Dairy*, the DOJ has not attempted to enforce the criminal statute.

<sup>631</sup>See *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968) (a supplier dealing with large retailers and wholesalers, who in turn sell to small retailers, must still treat all retailers equally); *FTC v. Simplicity Pattern Co.*, 360 U.S. 55 (1959) (cost justification not an available defense for Sections 2(d) and (e)).

<sup>632</sup>*FTC v. Henry Broch & Co.*, 363 U.S. 166 (1960).

<sup>633</sup>15 U.S.C. § 13(c) (1976).

<sup>634</sup>See, e.g., 2 AMERICAN BAR ASSOCIATION ANTITRUST SECTION, MONOGRAPH NO. 4, THE ROBINSON-PATMAN ACT: POLICY AND LAW, 32 (1983); KINTNER, *supra* note 597, at 206-07.

Co. decision, lower courts tended to read the seemingly absolute language of Section 2(c) quite literally to operate as a total ban on brokerage payments or discounts to a middleman who had any relationship with the other side of the transaction.<sup>635</sup>

In a confusing and poorly drafted opinion, Justice Douglas ruled in *Henry Broch & Co.* that Section 2(c) was violated by a broker reducing its commission to secure a sale at a reduced price when a manufacturer would not otherwise agree to a buyer's price.<sup>636</sup> He noted that Section 2(c) was designed to prohibit large buyers from receiving allowances for cost savings in distribution because they often dealt directly with the seller and did not need brokerage services.<sup>637</sup> Even acknowledging potential cost savings, he ruled out application of the cost justification defense.<sup>638</sup> Douglas did state, however, that "we would have quite a different case" if there was evidence that the buyer had rendered actual services to the seller or to the broker to gain a reduced brokerage charge.<sup>639</sup> He also limited the holding to situations in which a seller's broker accepts a reduced commission in order to obtain a "particular" order.<sup>640</sup>

Although Justice Douglas may have won the *Henry Broch & Co.* battle, in doing so he appears to have lost the Section 2(c) war. Intentionally or not, the case called into question earlier decisions, with the result that both the courts and the FTC have severely limited the reach of the statute.<sup>641</sup> Also, the viability of the provision as a part of the price discrimination law has been called into question.<sup>642</sup> Today, the courts have expanded the "for services rendered" exception to Section 2(c),<sup>643</sup> pretty

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<sup>635</sup>See, e.g., *Modern Marketing Serv., Inc. v. FTC*, 149 F.2d 970, 978 (7th Cir. 1945); *Southgate Brokerage Co. v. FTC*, 150 F.2d 607 (4th Cir.), *cert. denied*, 326 U.S. 774 (1945); *Great Atl. & Pac. Tea Co. v. FTC*, 106 F.2d 667 (3d Cir.), *cert. denied*, 308 U.S. 625 (1939); *Oliver Bros., v. FTC*, 102 F.2d 763 (4th Cir. 1939); *Biddle Purchasing Co. v. FTC*, 96 F.2d 687 (2d Cir.), *cert. denied*, 305 U.S. 634 (1938).

<sup>636</sup>*Henry Broch & Co.*, 363 U.S. at 171-72.

<sup>637</sup>*Id.* at 176.

<sup>638</sup>*Id.*

<sup>639</sup>*Id.* at 173.

<sup>640</sup>*Id.* at 176. The dissent would have restricted Section 2(c) even further and argued that a seller's broker who has agreed on a general commission rate should be able to renegotiate the rate with his principal to effect a sale that would otherwise be lost. *Id.* at 177 (Whitaker, J., dissenting). See also KINTNER, *supra* note 597, at 209. The dissent position has become the law as the courts have, post-*Henry Broch & Son*, substantially narrowed Section 2(c). See *supra* text accompanying notes 613-19.

<sup>641</sup>See, e.g., *Gibson v. FTC*, 682 F.2d 554 (5th Cir. 1982), *cert. denied*, 460 U.S. 1068 (1983); *Central Retailer-Owned Grocers, Inc. v. FTC*, 319 F.2d 410 (7th Cir. 1963); *Thomasville Chair Co. v. FTC*, 306 F.2d 541 (5th Cir. 1962).

<sup>642</sup>See 2 MONOGRAPH NO. 4, *supra* note 588, at 34; see also James F. Rill, *Brokerage Under the Robinson-Patman Act: Towards a New Certainty*, 41 NOTRE DAME L. REV. 337 (1966).

<sup>643</sup>See, e.g., *Lupia v. Stella D'Oro Biscuit Co.*, 586 F.2d 1163 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979); *Central Retailer-Owner Grocers, Inc. v. FTC*, 319 F.2d 410 (7th Cir. 1963); *Thomasville Chair Co. v. FTC*, 306 F.2d 541 (5th Cir. 1962).

much limiting the statute to situations involving so-called "dummy" brokerages<sup>644</sup> and in a few instances, commercial bribery.<sup>645</sup>

Thus, there is more than a little irony stemming from *Henry Broch & Co.*, for it gave life to the services rendered proviso of Section 2(c). Arguably, it also, because "its meaning was obscured by the many internal inconsistencies in the opinion,"<sup>646</sup> provided ample interpretative fodder for the FTC and the courts seeking to limit the admittedly anti-consumer reach of Section 2(c). Justice Douglas ended up writing the watershed opinion for narrowing Section 2(c), a provision designed to protect small businesses against the power of large buyers, irrespective of lower prices or cost savings.<sup>647</sup> It is probably not what he intended.

Overall, Justice Douglas' Robinson-Patman legacy is one of expansive interpretation and application. His record is not surprising, given that the Act is designed to protect small, independent businesses against the discriminatory pricing practices of large sellers and buyers. He apparently was unmindful that prohibitions on price discrimination interfere with the price mechanism which he otherwise sought so to protect.<sup>648</sup> He also was not troubled by the potential harm to consumers that the outlawing of price discriminations brings.<sup>649</sup>

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<sup>644</sup>A dummy brokerage typically involves actual unearned brokerage payments to a buyer through a fictitious or shell broker set up by the buyer. See, e.g., *Gibson v. FTC*, 682 F.2d 554 (5th Cir. 1982), cert. denied, 460 U.S. 1068 (1983); *Burge v. Bryant Public School District of Saline County*, 658 F.2d 611 (9th Cir. 1981); *Stephen Jay Photography, Ltd. v. Olan Mills, Inc.*, 713 F. Supp. 937 (E.D. Va. 1989).

<sup>645</sup>Commercial bribery in this context generally involves payment of a secret commission to an employee of a purchaser or to a state purchasing agent. See, e.g., *Harris v. Duty Free Shoppers Ltd.*, 940 F.2d 1272 (9th Cir. 1991); *Grace v. E.J. Kozin Co.*, 538 F.2d 170 (7th Cir. 1976); *Rangen, Inc. v. Sterling Nelson & Sons*, 351 F.2d 851 (9th Cir. 1965), cert. denied, 383 U.S. 936 (1966). Of course, whether commercial bribery should be part of the price discrimination law is questionable. See *Keller W. Allen & Meriwether D. Williams, Commercial Bribery, Antitrust Injury and Section 2(c) of the Robinson-Patman Anti-Discrimination Act*, 26 GONZ. L. REV. 167 (1990-91).

<sup>646</sup>KINTNER, *supra* note 597, at 210. For other criticisms of *Henry Broch & Co.*, see *FREDERICK ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT* 330 (1962), Rill, *supra* note 642, Note, *Beleaguered Brokers: The Evisceration of Section 2(c) of the Robinson-Patman Act*, 77 HARV. L. REV. 1308 (1964), and Carl W. Schwarz, Note, *Unfair Trade Practices—Robinson-Patman Act—Savings Realized on Salesmen's Commissions Cognizable Under Section 2(c)*, 30 GEO. WASH. L. REV. 137 (1961).

<sup>647</sup>See 2 MONOGRAPH No. 4, *supra* note 588, at 38.

<sup>648</sup>In *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), discussed in Antitrust Monograph, *supra* note 547, at ch. 4, Justice Douglas made known his opposition to any interference with the free market's determination of price, whether direct or indirect. Of course, a prohibition on price discrimination does interfere with price, to the detriment of the favored purchasers, since it renders illegal certain price discounts which the market would otherwise allow.

<sup>649</sup>Theoretically, at least, a favored purchaser may pass along some or all of the savings occasioned by the price discount it receives in order to sell more of goods. Consumers, thus, may benefit from a price discrimination just as they do from any lower price. The prohibiting of price discrimination often results in higher prices to buyers who would otherwise be

Recent Supreme Court interpretations have attempted to reconcile the Robinson-Patman Act with a consumer welfare antitrust model, focusing on competition rather than competitors.<sup>650</sup> As a result, the interpretation of the Act has narrowed and it has become significantly more difficult to prevail against an alleged price discriminator. Justice Douglas would certainly not approve. One can just imagine his reaction to the Wal-Marts and CostCos of the marketplace, particularly in smaller towns and cities where the locally owned retailers have been squeezed out of business and the town squares are largely boarded up. The fact that consumers in small town America have a far greater choice of goods and services at lower prices would probably not appease him.

#### XIV. ANTITRUST AND THE REGULATED ECONOMY

The tension between antitrust law and governmental regulation of portions of the economy created real conflict for New Dealers like Justice Douglas, who believed stridently in both the antitrust laws as the guardian of our free market economy and government regulation as a cure-all for aberrations in that economy. Congress typically refrained from granting explicit antitrust immunity from regulated sectors and gave little or no guidance about the continuing reach or role of antitrust in those areas, in effect leaving those questions to the judiciary.<sup>651</sup>

Not surprisingly, given realist judges, little congressional direction and conflicting values, the results seem inconsistent. For example, as noted in Part X, Justice Douglas and his brethren seemingly emasculated the Bank Merger Act of 1966, which Congress, in the wake of several controversial Supreme Court decisions involving bank mergers, passed to curtail antitrust scrutiny of bank mergers.<sup>652</sup> In *Hughes Tool Co. v. Trans World Airlines, Inc.*, however, Douglas, writing for a six-justice majority, held that Toolco's agreement to acquire control of TWA was immune from antitrust review because the acquisition had been approved by the Civil Aeronautics Board pursuant to the board's authority under the Federal Aviation Act.<sup>653</sup>

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avored and thus may affirmatively harm consumers who do not benefit from prices which would otherwise be lower.

<sup>650</sup>See *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 181 (2006) ("[W]e . . . resist interpretation geared more to the protection of existing *competitors* than to the stimulation of *competition* . . . [W]e continue to construe the act 'consistently with broader policies of the antitrust laws.'" (quoting *Brooke Group Ltd. v. Brown & Williamson Corp.*, 509 U.S. 209, 220 (1993)). See also *Falls City Indus. v. Vanco Beverage, Inc.*, 460 U.S. 428 (1983); *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981); *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69, 80 n.13 (1979); *United States v. U.S. Gypsum Co.*, 438 U.S. 422 (1978). Cf. *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543 (1990).

<sup>651</sup>See generally Jerome Shuman, *The Application of the Antitrust Laws to Regulated Industries*, 44 TENN. L. REV. 1, 20-28 (1976).

<sup>652</sup>See *United States v. First City Bank of Houston*, 386 U.S. 361 (1967); *United States v. Third Nat'l Bank in Nashville*, 390 U.S. 171 (1968); see also *supra* text accompanying notes 402-13.

<sup>653</sup>*Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973). See also *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940) (where Justice Douglas, writing for an 8-1 majority, ruled that Congress' grant of rate-making authority to the National Bituminous Coal Commission exempted its rates from antitrust scrutiny). "Certainly what Congress has

In *Hughes Tool*, Justice Douglas gave deference to the CAB's determination that the acquisition was in the public interest.<sup>654</sup> Conversely, in *First City Bank of Houston*, Justice Douglas held that judicial review of the Comptroller of Currency's finding of public interest must be de novo and, further, that the merging banks bore the burden to establish the defense.<sup>655</sup>

Justice Douglas' general view, shared by his Warren Court brethren, was that "[i]mmunity from the antitrust laws is not lightly implied."<sup>656</sup> In *California v. Federal Power Commission*, he applied that notion to dueling administrative and judicial proceedings. There, writing for a 5-2 majority,<sup>657</sup> Douglas ruled that the Federal Power Commission must stay its consideration on the merits of a merger application under the National Gas Act in deference to a pending antitrust challenge in federal court. Since the Federal Power Commission, unlike other agencies, was not specifically authorized to enforce Section 7 of the Clayton Act, Douglas held that it must defer to an antitrust suit.<sup>658</sup>

Justice Douglas, again writing for the Court, reached the same conclusion in *Otter Tail Power Co. v. United States*, a case involving a power company's refusal to sell power to municipal utilities.<sup>659</sup> The defendant asserted that since the Federal Power Commission had the statutory authority to compel involuntary interconnections of power under the Federal Power Act, it should be immune from antitrust scrutiny.<sup>660</sup> The Court, per Douglas, dismissed that argument, pointing to Congress' rejection of a pervasive regulatory scheme under the Act in favor of voluntary decision-making about connections with other systems.<sup>661</sup> According to

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forbidden by the Sherman Act it can modify. It may do so, by placing the machinery of price-fixing in the hands of public agencies." *Id.* at 396.

<sup>654</sup>*Hughes Tool Co.*, 409 U.S. at 382.

<sup>655</sup>*First City Bank of Houston*, 386 U.S. at 366-70.

<sup>656</sup>*Cal. v. Fed. Power Comm'n*, 369 U.S. 482, 485 (1962). See also *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350 (1963); *Silver v. N.Y.S.E.*, 373 U.S. 341, 357 (1963); *Milk Producers Ass'n v. United States*, 362 U.S. 458 (1960).

<sup>657</sup>*Fed. Power Comm'n*, 369 U.S. 482. Justice Harlan, joined by Justice Stewart, dissented while Justices Frankfurter and White did not participate. *Id.*

<sup>658</sup>*Id.* at 486. He reached this conclusion even though Section 7 of the Clayton Act did provide that "Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the . . . Federal Power Commission . . . under any statutory provision vesting such power in such Commission," since that "was plainly not a grant of power to adjudicate antitrust issues." Not surprisingly, Justice Harlan strongly disagreed, asserting that the majority had "in effect, transfer[ed] to the Antitrust Division . . . regulatory functions entrusted to administrative agencies . . ." It did so, according to Harlan, "without advert[ing] to any legal principle or statute to support its decision" but by "lay[ing] down a pervasive rule born by its own abstract notions of 'what orderly procedure' requires." *Id.* at 491 (Harlan, J., dissenting).

<sup>659</sup>*Otter Tail*, 410 U.S. 366 (1973).

<sup>660</sup>*Id.* at 373.

<sup>661</sup>*Id.* at 374. He also noted the lack of any legislative history which would support the granting of antitrust immunity. *Id.* at 373-74.

Douglas, when power companies' interconnection decisions are governed initially by their own business judgments, rather than regulatory coercion, "courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws."<sup>662</sup>

As illustrated by *California v. Federal Power Commission* and *Otter Tail Power Co. v. United States*, the Warren and early Burger Courts usually declined to defer antitrust adjudication to administrative or regulatory action, unless it found the agency's authority pervasive enough to preempt antitrust law.<sup>663</sup> Justice Douglas, however, was less likely to defer to regulatory schemes than his brethren, particularly in instances in which the Court found that the regulatory control was sufficient to provide the relevant agency with primary but not exclusive jurisdiction.<sup>664</sup> For example, he dissented in *Far East Conference v. United States*,<sup>665</sup> a case in which the Court ordered the dismissal of a government enforcement suit brought before the Federal Maritime Board, which had considered the legality of steamship companies' dual system of rates.<sup>666</sup>

The majority's view was that in cases requiring administrative discretion or not involving facts within the normal experience of judges "agencies created by Congress for regulating the subject matter [rates] should not be passed over."<sup>667</sup> According to Justice Douglas, however, the government should be able to proceed on its antitrust challenge because the Federal Maritime Board had never approved the dual rate agreement, only a more general agreement that the Conference would adopt a tariff of rates.<sup>668</sup> In his view, the Conference was "operat[ing] outside the law not only because they have failed to submit their schedule of rates to the Board but also because the rates adopted would, if approved, be illegal."<sup>669</sup>

In *Pennsylvania Water & Power Co. v. Federal Power Commission*, Justice Douglas again took issue with the majority's assessment of a regulatory agency's

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<sup>662</sup>*Id.* at 374.

<sup>663</sup>*See* *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973); *see also* *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296 (1963); *Gordon v. N.Y.S.E.* 422 U.S. 659 (1975); *United States v. Nat'l Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694 (1975).

<sup>664</sup>*But cf.* Epstein, *supra* note 63. Writing in 1949, Epstein stated that "it is not entirely impossible that Justice Douglas' concern for anti-trust law enforcement is merely an expression of a desire to have the government regulate business in whatever way happened to be available at the moment." *Id.*

<sup>665</sup>*Far East Conference v. United States*, 342 U.S. 570 (1951).

<sup>666</sup>The Far East Conference was made up of steamship companies engaged in outbound Far East shipping. They had established a dual rate system which charged shippers a lower rate if they agreed to use exclusively the bottoms of the steamships. *Id.* at 572.

<sup>667</sup>*Id.* at 574.

<sup>668</sup>If the Board had approved the dual rates in compliance with the Shipping Act, Justice Douglas acknowledged that it would have exclusive jurisdiction and the rates would be immune from the Sherman Act. *Id.* at 578 (Douglas, J., dissenting).

<sup>669</sup>*Id.* at 579. The steamship companies were "therefore, flout[ing] the law as plainly as if they used rates that had been disapproved by the Board." *Id.*

dispute with a regulated entity, here a public power utility.<sup>670</sup> The case is perhaps mostly notable for being one of the very few times that Justices Douglas and Black disagreed in a case involving antitrust issues.<sup>671</sup> It involved the FPC's order to Penn Water & Power Company to reduce its rates in response to complaints by Maryland officials that Penn Water had been gouging a purchaser utility in Maryland. Penn Water alleged that the order required it to continue performing a contract illegal under the Sherman Act.<sup>672</sup> The Court refused to set aside the Commission's order, holding that the agency was merely acting under its ratemaking authority and was not compelling Penn Water & Power to perform illegal contracts.<sup>673</sup> According to Black, the plaintiff was attempting to use the Sherman Act to nullify a rate reduction order issued under the FPC's authorized regulatory power.<sup>674</sup>

Justice Douglas saw the issue quite differently, stating that "[t]here is lawless conduct that overshadows the evils of extortionate rates."<sup>675</sup> The contract that eliminated competition between the two public utilities was a "greater evil" than "[t]he desire to reduce excessive rates."<sup>676</sup> According to Douglas, the FPC had approved and thus sought to perpetuate an "unholy alliance" between the utilities.<sup>677</sup>

While the Court in *Pennsylvania Water & Power* thought that the FPC was doing its job in reducing excessive rates, Justice Douglas believed that the majority was missing the forest for the trees. He would have imposed on the regulatory agency not only the job of benefiting consumers by lowering rates but, presumably, also of untangling the underlying "unholy alliance" contract that divided markets.<sup>678</sup> It was not enough that regulatory agencies they regulated rates; in his view they should also assure that the competition was alive and well within their regulated sphere.

Justice Douglas also dissented in *Ricci v. Chicago Mercantile Exchange*, a 5-4 decision in which the Court ruled that antitrust proceedings should be stayed pending the Commodity Exchange Commission's review of the respondent's allegedly

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<sup>670</sup>*Pa. Water & Power Co. v. Fed. Power Comm'n*, 343 U.S. 414 (1952).

<sup>671</sup>Justice Black wrote the opinion for the six justice majority while Justice Douglas was joined in dissent by Justice Reed. Justice Frankfurter was ill and did not participate. *Id.* at 424.

<sup>672</sup>Apparently Penn Water's contract with the Maryland public utility, Consolidated Gas Electric Light and Power Company of Baltimore, divided markets and insured that the two would not be in direct competition. See *Pa. Water & Power Co. v. Consol. Gas, Elec., Light & Power Co.*, 184 F.2d 552 (4th Cir. 1950).

<sup>673</sup>*Pa. Water*, 343 U.S. at 421-22.

<sup>674</sup>*Id.* at 424.

<sup>675</sup>*Id.* (Douglas, J., dissenting).

<sup>676</sup>*Id.* at 424-25.

<sup>677</sup>*Id.* at 425-26.

<sup>678</sup>Or at a minimum Justice Douglas believed the Commission should not act to indirectly support a private restraint of trade. He would have reversed and remanded the case to the Commission "with directions that the Commission build its rate order on the powers that it has under the Federal Power Act, not on the unholy alliance that these utilities created and that the Commission has sought to perpetuate." *Id.* at 426.

unlawful conduct.<sup>679</sup> He joined Justice Marshall's four-justice dissent and added an additional statement of his own.<sup>680</sup> Marshall would have struck the balance between administrative and judicial proceedings in favor of immediate court action when a private plaintiff had uncertain access to the administrative process.<sup>681</sup> Douglas added that he would tip the scales even more toward judicial action, particularly when the administrative agency, as in the case at hand, has not acted to enforce the alleged wrongdoing on its own.<sup>682</sup>

Much earlier in *De Beers Consolidated Mines, Ltd. v. United States*, Justice Douglas had objected to the Court's overturning of a preliminary injunction granted by a district court against foreign defendants charged by the Justice Department with a conspiracy to restrain trade and monopolize gem and industrial diamonds.<sup>683</sup> The injunction forbade the seven corporate defendants from removing, transferring, or selling any assets located within the United States during the pendency of the litigation. The five-justice majority viewed the injunction as an unlawful sequestration of defendants' property prior to the entry of a judgment.<sup>684</sup>

Justice Douglas, joined by Justices Black, Murphy and Rutledge, objected to the Court's hearing of what he termed an interlocutory appeal.<sup>685</sup> He could see no extraordinary circumstances warranting the taking of the appeal, characterizing the actual hardship upon the defendants from the issuance of the injunction as "no more than the cost of procuring of a bond."<sup>686</sup> One would doubt whether Douglas would have supported a similar injunction if issued against small U.S. companies struggling to compete but nonetheless the target of an antitrust suit. It is hard to imagine that he would have then hidden behind a procedural disinclination to hear interlocutory appeals when the effective sequestration of property prior to judgment was at issue. But he did not see a problem in an antitrust enforcement action against foreign defendants.

Thus, even more than the hawkish Warren Court, Justice Douglas favored generous application of the antitrust laws, whether procedurally or substantively. And while he joined the Court in finding that the constitutionally protected right to petition the government trumped the antitrust laws and thus created antitrust immunity for certain types of collective action,<sup>687</sup> later in *California Motor Transport*

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<sup>679</sup>*Ricci v. Chi. Mercantile Exch.*, 409 U.S. 289 (1972).

<sup>680</sup>*Id.* at 308-09 (Douglas, J., Marshall, J., dissenting).

<sup>681</sup>*Id.* at 321.

<sup>682</sup>*Id.* at 308-09.

<sup>683</sup>*De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212 (1945).

<sup>684</sup>*Id.* at 222. The Court suggested that if the preliminary injunction should stand, any plaintiff would be able to seek a similar injunction in equity which would in effect sequester any defendant's assets pending a later judgment on the merits. *Id.* at 222-23.

<sup>685</sup>*Id.* at 223-24 (Douglas, J., dissenting).

<sup>686</sup>*Id.* at 224.

<sup>687</sup>*E. R.R. Presidents Conference v. Noerr Motor Freight Co.*, 365 U.S. 127, 135-45 (1961).



*Co. v. Trucking Unlimited*,<sup>688</sup> Douglas was the architect of the so-called “sham exception” to what had become known as the *Noerr-Pennington* doctrine.<sup>689</sup> In *California Motor Transport*, one group of motor carriers sued another, claiming that the latter had conspired to monopolize trade by filing a series of repetitive, meritless federal and state actions to contest plaintiffs’ applications to acquire operating rights to transport goods.<sup>690</sup>

Writing for the Court, Justice Douglas referred to dicta in *Noerr* in holding that the antitrust immunity arising from the right to petition did not extend to “a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor . . . .”<sup>691</sup> In activating the *Noerr* dicta, Douglas sought to distinguish between legitimate attempts to influence public officials and attempts “to bar . . . competitors from meaningful access to adjudicatory tribunals and so to usurp that decisionmaking process.”<sup>692</sup> Accordingly, “a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused.”<sup>693</sup>

Thus, even when confronted with a purported constitutionally protected right, Justice Douglas seemed reluctant for the antitrust laws to be supplanted. At a minimum, he wanted an appropriate balance and did not want parties hiding behind the *Noerr-Pennington* immunity while they abused the system for competitive gain. For example, writing for the Court in *Otter Tail Power Company v. United States*,<sup>694</sup> he remanded a district court decision to determine whether the sham exception applied when defendants sponsored litigation for the purpose of delaying or stopping the establishment of competing municipal electric utility systems.<sup>695</sup>

The Supreme Court’s view of the reach of the commerce clause and thus Sherman Act jurisdiction expanded significantly during Justice Douglas’ tenure.<sup>696</sup>

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<sup>688</sup>*Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 511-16 (1972).

<sup>689</sup>Justice Douglas had written a separate concurring opinion in *United Mine Workers of America v. Pennington*, 381 U.S. 657, 672-74 (1965), applying the second prong of the *Noerr-Pennington* immunity, but on the labor exemption issue in the case. For a brief history of the *Noerr-Pennington* doctrine, see Rogers, *supra* note 135, at 169-73.

<sup>690</sup>*Cal. Motor Transport Co.*, 404 U.S. at 509.

<sup>691</sup>*Id.* at 511 (quoting *E. R.R. Presidents Conference*, 365 U.S. at 144).

<sup>692</sup>*Id.* at 511-12.

<sup>693</sup>*Id.* at 513. Not surprisingly, the sham exception has generated a good deal of litigation as courts attempt to draw the line between legitimate access to government tribunals and abuse of the system. See, e.g., *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993); *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991).

<sup>694</sup>*Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

<sup>695</sup>The district court had ruled that the *Noerr-Pennington* immunity could not apply to issues concerning access to the judicial branch, as opposed to the legislative and executive branches. *California Motor Transport*, decided after the district court decision in *Otter Tail*, had held otherwise but raised the specter of the sham exception. Thus, the district court may have reached the correct result but for the wrong reason. *Id.* at 379-80.

<sup>696</sup>See, e.g., *United States v. Int'l Boxing Club*, 348 U.S. 236 (1955); *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); *Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219 (1948); *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947); *United States v. Sec.*

Douglas was in the forefront, writing the opinion for a unanimous Court in *Moore v. Mead's Fine Bread*.<sup>697</sup> There the plaintiff was a bakery in Santa Rosa, New Mexico competing locally with a bread company which also sold bread in Farwell, Texas, on the Texas-New Mexico border. The plaintiff alleged that the defendant had cut prices in Santa Rosa, forcing it out of business in violation of the Robinson-Patman Act. Douglas held that the defendant's act of sending a truck to Farwell each day to sell bread was sufficient to confer jurisdiction, even though plaintiff was not itself engaged in interstate commerce.<sup>698</sup> He later acknowledged that finding that "the destruction of a local competitor by purely local tactics" conferred antitrust jurisdiction was "probably as far-reaching as any decision under the Commerce Clause."<sup>699</sup>

Justice Douglas' view of Sherman Act jurisdiction was ultimately even more expansive than the rest of the Court's. Not surprisingly, Justice Douglas dissented in *Flood v. Kuhn*, a case that upheld professional baseball's long-standing exemption from the antitrust laws.<sup>700</sup> In doing so, he admittedly changed his position from almost twenty years before when he had voted to uphold baseball's judicially created antitrust exemption.<sup>701</sup>

In *Flood*, the majority rigidly applied stare decisis to uphold the 1922 *Federal Baseball* decision that had held that organized baseball was not involved in interstate commerce.<sup>702</sup> The Court in *Federal Baseball* had ruled that there could be no Sherman Act jurisdiction involving organized baseball, since Congress' ability to legislate was constrained by the commerce clause. In the intervening fifty years, the Court's notion of interstate commerce had greatly expanded<sup>703</sup> and the antitrust laws had been readily applied to other professional sports.<sup>704</sup> Justice Blackmun, writing

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Underwriters Ass'n, 322 U.S. 533 (1944); *Wickard v. Filburn*, 317 U.S. 111 (1942). For Justice Douglas' view of the Supreme Court's expansion of the commerce clause as applied to the antitrust laws see WILLIAM O. DOUGLAS, *WE THE JUDGES: STUDIES IN AMERICAN AND INDIAN CONSTITUTIONAL LAW FROM MARSHALL TO MUKHERJEE* 210-217 (1956).

<sup>697</sup>*Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954).

<sup>698</sup>*Id.* at 119.

<sup>699</sup>DOUGLAS, *supra* note 696, at 216-17.

<sup>700</sup>*Flood v. Kuhn*, 407 U.S. 258 (1972).

<sup>701</sup>*Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356 (1953). In his words, "I have lived to regret it; and I would now correct what I believe to be [*Toolson's*] fundamental error." *Flood*, 407 U.S. at 286, n.1.

<sup>702</sup>*Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 209 (1922).

<sup>703</sup>*See United States v. Int'l Boxing Club*, 348 U.S. 236 (1955); *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); *Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219 (1948); *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947); *United States v. Sec. Underwriters Ass'n*, 322 U.S. 533 (1944); *Wickard v. Filburn*, 317 U.S. 111 (1942).

<sup>704</sup>*See, e.g., Radovich v. Nat'l Football League*, 352 U.S. 445 (1957); *United States v. Int'l Boxing Club*, 348 U.S. 236 (1955); *Deesen v. Prof'l Golfers' Ass'n*, 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966); *Peto v. Madison Square Garden Corp.*, 1958 Trade Cas. (CCH) ¶ 69,106 (S.D.N.Y.) (hockey); *Wash. Prof'l Basketball Corp. v. Nat'l Basketball Ass'n*, 147 F. Supp. 154 (S.D.N.Y. 1956). *See also Gardella v. Chandler*, 172 F.2d 402, 408-

for the *Flood* majority,<sup>705</sup> nonetheless held that congressional silence in the years since the *Federal Baseball* decision and organized baseball's long reliance on its antitrust exemption mandated that the Court "adhere" to its earlier decisions.<sup>706</sup>

The year before *Flood*, Justice Douglas had, as Circuit Justice for the Ninth Circuit, reinstituted an injunction that allowed Spencer Haywood, who was challenging the NBA's so-called four-year rule, to play in the NBA playoffs.<sup>707</sup> In doing so, Douglas noted in passing, without citing authority, that professional basketball was not exempt from the antitrust laws.<sup>708</sup> In his dissent in *Flood*, he argued, correctly it seems, that the Court, not Congress, should overturn *Federal Baseball* since the Court, not Congress, penned the decision.<sup>709</sup> He also made it clear that he believed organized baseball's reserve clause, which bound a player to his team beyond the term of the contract but for the player's entire playing career, was an unreasonable restraint of trade.<sup>710</sup>

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09 (2d Cir. 1949) (Frank, J., concurring opinion) (labeling *Federal Baseball* "an impotent zombi"); *United States v. Shubert*, 348 U.S. 222 (1955) (refusing to apply *Federal Baseball* to theatrical business).

<sup>705</sup>Part I of Justice Blackmun's opinion, captioned "The Game," was a panegyric to baseball, quoting Grantland Rice and George Bernard Shaw, among others. Blackmun also included a long list of baseball's legendary names including Tris Speaker, Rogers Hornsby, Wahoo Sam Crawford, Amos Rusie, Three-Finger Brown, Smokey Joe Wood, Wee Willie Keeler, Lefty O'Doul, Old Hoss Radbourne, Goose Goslin, Dizzy Dean, Dazzy Vance, Iron Man McGinnity, Stuffie McInnis, Eppa Rixey, Pie Traynor, Nap Lajoie, Rabbit Maranville, Big Ed Delahanty, Honus Wagner, Christy Mathewson, Grover Cleveland Alexander, Babe Ruth, Ty Cobb, Lou Gehrig, Walter Johnson and many more. *Flood*, 407 U.S. at 262 n.2. Blackmun was later heard to lament that he had neglected to include Van Lingo Mungo. Interestingly, two justices, White and Burger, voted with the majority and concurred in all but Part I of Blackmun's opinion. Perhaps Justice White, a former football All-American at the University of Colorado (whose football nickname was "Whizzer" White) did not share Blackmun's view of baseball as the National Pastime.

<sup>706</sup>*Flood*, 407 U.S. at 283-85. See generally C. Paul Rogers III, *Judicial Reinterpretation of Statutes: The Example of Baseball and the Antitrust Laws*, 14 HOUS. L. REV. 611 (1977). In 1998 Congress finally did act, at the behest of the baseball owners and players' union, to strike down baseball's antitrust immunity with respect to activities affecting the employment of players. The Curt Flood Act of 1998, Pub.L.No. 105-297, 112 Stat. 2824. The Act retains the status quo with regard to franchise relocation, the amateur baseball draft, and the relationship of major league baseball and the minor leagues. *Id.*

<sup>707</sup>*Haywood v. Nat'l Basketball Ass'n*, 401 U.S. 1204 (1971). The four-year rule restricted a player from entering the NBA until four years after his graduation from high school.

<sup>708</sup>*Id.* at 1205.

<sup>709</sup>Justice Douglas characterized *Federal Baseball* as "a derelict in the stream of the law that we, its creator, should remove." *Flood*, 407 U.S. at 286 (Douglas, J., dissenting).

<sup>710</sup>According to Justice Douglas, "[t]he equities are with the victims of the reserve clause . . . since a contract which forbids anyone to practice his calling is commonly called an unreasonable restraint of trade." *Id.* at 287. On the reserve clause, see, e.g., C. Paul Rogers III, *Napoleon Lajoie, Breach of Contract and the Great Baseball War*, 55 SMU L. REV. 325 (2002), ROGER I. ABRAMS, *LEGAL BASES: BASEBALL AND THE LAW* 64-69 (1998), G. EDWARD WHITE, *CREATING THE NATIONAL PASTIME: BASEBALL TRANSFORMS ITSELF 1903-1953* 275-

In his last term, Justice Douglas dissented in two other antitrust jurisdictional decisions, arguing for a more expansive interpretation of the "in commerce" requirement of the Clayton Act. In *Gulf Oil Corporation v. Copp Paving Company*<sup>711</sup> and *United States v. American Building Maintenance Industries*,<sup>712</sup> the Court held that the Clayton Act's "in commerce" language must be read more narrowly than the Sherman Act's "in or affecting commerce" language, thus narrowing the jurisdictional reach of the Clayton Act to actions "in the flow" of commerce. Douglas reasoned, to the contrary, that since the Clayton Act was intended to complement the Sherman Act by curtailing anticompetitive practices in their incipiency, the Court should not "lightly assume" that Congress intended the jurisdictional reach of the Clayton Act to be narrower than the Sherman Act.<sup>713</sup>

Not surprisingly, Justice Douglas favored allowing states to enforce the antitrust laws through Sections 4 and 16 of the Clayton Act. Writing for a narrow 5-4 majority in *Georgia v. Pennsylvania Railroad Company*, Justice Douglas ruled that the State of Georgia could bring suit as *parens patriae* for its citizens for injunctive relief under Section 16 of the Clayton Act against twenty railroads accused of conspiring to fix rates.<sup>714</sup> Then, twenty-seven years later in *Hawaii v. Standard Oil of California*, the Court held that a state could not recover damages for injury to its general economy in a *parens patriae* suit.<sup>715</sup> Douglas vigorously dissented, characterizing the majority's approach to remedies as "miserly" and asserting that he saw "no way of distinguishing the instant case from *Georgia v. Pennsylvania Railroad Company*."<sup>716</sup>

Justice Douglas also joined Justice Brennan's lengthier dissent, which pointed out that in the earlier case Georgia was denied damages only because its recovery might have violated the *Keogh* doctrine as an illegal rebate.<sup>717</sup> Brennan and Douglas both favored allowing the State of Hawaii to recover damages as *parens patriae* for overcharges paid by its citizenry because of an oil company price fixing conspiracy.<sup>718</sup>

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315 (1996), and *BASEBALL AND THE AMERICAN LEGAL MIND* 75-137 (Spencer Weber Waller, Neil B. Cohen & Paul Finkelman, eds., 1995).

<sup>711</sup>*Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974).

<sup>712</sup>*United States v. Am. Bldg. Maint. Ind.*, 422 U.S. 271 (1975).

<sup>713</sup>*Gulf Oil*, 419 U.S. at 206 (Douglas, J., dissenting). See also *Am. Bldg.*, 422 U.S. at 286 (Douglas, J., dissenting). In what perhaps was some vindication for Justice Douglas' position, in 1980 Congress broadened Section 7 of the Clayton Act to cover mergers "affecting commerce." 15 U.S.C. § 18 (1980).

<sup>714</sup>*Georgia v. Penn. R.R. Co.*, 324 U.S. 439 (1945).

<sup>715</sup>*Hawaii v. Standard Oil of Cal.*, 405 U.S. 251, 264 (1972). The Court held that a state could recover damages for injury to its commercial interests under Section 4 of the Clayton Act. *Id.*

<sup>716</sup>*Id.* at 266-68 (Douglas, J., dissenting).

<sup>717</sup>*Id.* at 270, 272 (Brennan, J., dissenting). The contested rates in *Georgia v. Pennsylvania Railroad Co.* had been approved by the Interstate Commerce Commission, arguably bringing it within *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156 (1922).

<sup>718</sup>*Hawaii v. Standard Oil*, 405 U.S. at 277.

In his separate dissent, Justice Douglas acknowledged that there “are doubtless rationales that express a prejudice against liberal construction of the antitrust laws.”<sup>719</sup> His solution was to let the case go to trial and to leave it to Congress to decide if states should be restricted under Section 4 of the Clayton Act to their own proprietary interests.<sup>720</sup> In acknowledging his “liberal” construction and punting to Congress if they did not like it, Douglas reaffirmed his position as the leading antitrust hawk on the Court.<sup>721</sup>

Thus, the record establishes that Justice Douglas favored a more expansive application of the antitrust laws than even his liberal brethren. Although as a New Dealer he could hardly be said to oppose government regulation to boost the economy, he certainly believed that the antitrust laws should trump regulatory schemes whenever possible, even if Congress suggested otherwise. If an implied antitrust immunity was necessary, he was sure to impose limits. Subject matter jurisdiction was to extend to the full, some would say exaggerated, reach of the commerce clause.

Was this liberal application of the antitrust laws because of his abiding belief in the free market economy? That is certainly part of the answer. But a more accurate assessment would posit that Justice Douglas was concerned about loss of judicial control over the economy. He wanted to apply his brand of antitrust, including its use to protect small, independent businesses and to regulate the economy, rather than to cede authority to agencies with other regulatory concerns. The antitrust laws are, at bottom, nothing less than a kind of government regulation of business conduct. The Sherman and Clayton Acts, written as generally as they were, necessarily have required the courts to play a large role in their interpretation and enforcement. Douglas was not only loath to give any part of that responsibility away but sought to expand it whenever possible.

#### XV. LABOR AND ANTITRUST

Although Justice Douglas was most assuredly pro-labor,<sup>722</sup> his zeal for antitrust enforcement must have caused him considerable anxiety when the two came into conflict. In fact, his opinions in the area seem somewhat schizophrenic. He was at his contrarian best in dealing with the labor exemption, almost always dissenting, writing no majority opinions and rarely voting with the majority.<sup>723</sup> He dissented when he thought the majority was expanding the exemption and when he believed the Court was applying it too strictly. The sole consistency seems to be that he never agreed with his brethren about where the line should be drawn.<sup>724</sup>

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<sup>719</sup>*Id.* at 270.

<sup>720</sup>*Id.*

<sup>721</sup>One wonders why Justice Douglas penned a separate dissent from Justice Brennan since they agreed on the construction of *Georgia v. Pennsylvania Railroad Co.* and the reach of Section 4, other than to display his independence on this issue.

<sup>722</sup>*See, e.g.,* SIMON, *supra* note 9, at 267-68, 270-71.

<sup>723</sup>*See* Allen Bradley Co. v. Local Union No. 3, Int’l Bhd. of Elec. Workers, 325 U.S. 797 (1945).

<sup>724</sup>One exception is *United States v. National Association of Real Estate Boards*, 339 U.S. 485, 490-91 (1950). There, writing for a 6-1 majority, with Justices Frankfurter and Clark not

He sometimes believed that the majority was interpreting the non-statutory labor exemption to allow organized labor too much intrusion into the marketplace. An example is his dissent in *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of N.A. v. Jewel Tea Co., Inc.*, in which a divided Court held that an agreement between a trade association of food retailers and local unions restricting the operating hours of fresh meat departments was exempt from antitrust scrutiny.<sup>725</sup>

The plaintiff had resisted a union proposal to restrict operating hours to 9 a.m. to 6 p.m., which a large trade association of 1,000 merchants and 300 meat dealers had agreed to under the duress of a strike vote.<sup>726</sup> Justice Douglas in dissent argued that "unions can no more aid a group of businessmen to force their competitors to follow uniform store marketing hours than to force them to sell at fixed prices."<sup>727</sup> As he viewed it, the unions had "induced a large group of merchants to use their collective strength to hurt others who wanted the competitive advantage of selling meat after 6 [p.m.]."<sup>728</sup> In sum, he believed that a conspiracy between a union and a large number of merchant-employers to impose competitive conditions on other merchant-employers should not be shielded from antitrust under the rubric of collecting bargaining.

Justice Douglas also felt compelled to concur in *United Mine Workers of America v. Pennington*,<sup>729</sup> decided the same day as *Jewel Tea*. There the Court held that the participation of a union in an industry-wide collective bargaining agreement whereby employers and the union agreed on a wage scale, which forced some small employers out of business, was not within the nonstatutory labor antitrust exemption. Justice Douglas' concurrence was motivated by the fact that the conspiracy imposed high wages to drive "the small, marginal companies" out of business.<sup>730</sup> He noted that Congress is "[t]he only architect of our economic system." Thus, the Court is correct "in adhering to [our] free enterprise system as expressed in the antitrust laws . . . until the Congress delegates to big business and big labor the power to remold our economy in the manner charged here."<sup>731</sup>

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participating, Justice Douglas ruled that real estate commissions fixed by a real estate board were simply fees and were not wages falling under the labor exemption.

<sup>725</sup>*Local Union No. 189, Amalgamated Meat Cutters & Butchers of N. Am. v. Jewel Tea Co.*, 381 U.S. 676, 691 (1965). The Court concluded that the hours of operation were "well within the realm of 'wages, hours, and other terms and conditions of employment' about which employers and unions must bargain." *Id.*

<sup>726</sup>*Id.* at 680-81.

<sup>727</sup>*Id.* at 737 (Douglas, J., dissenting). He was joined by Justices Black and Clark. Justice Douglas believed that the Court had failed to follow the well-established *Allen Bradley Co.* decision, which had outlawed unions from combining with employers and manufacturers of goods to restrain competition in or to monopolize the marketing of the goods.

<sup>728</sup>*Id.*

<sup>729</sup>*United Mine Workers v. Pennington*, 381 U.S. 657, 672 (1965) (Douglas, J., concurring). He was joined by Justices Black and Clark.

<sup>730</sup>*Id.* at 675.

<sup>731</sup>*Id.*

Earlier, in *Los Angeles Meat & Provision Drivers Union v. United States*,<sup>732</sup> Justice Douglas had disagreed with the Court about the appropriate remedy for activity among “grease peddlers” who fixed prices and allocated territories under the guise of union activity. While the full range of antitrust remedies was available against the defendants, Justice Douglas disputed that the Court had the authority to expel them from the union under the Norris-LaGuardia Act for their restraint of trade activities.<sup>733</sup> He was willing to interpret “labor dispute” under the Act broadly so as to protect the right of small, independent contractors to maintain union membership even when the defendants were not engaged in actual collective bargaining.

He also dissented in *Ramsey v. Leon Nunley Coal Co. v. United Mine Workers of America*,<sup>734</sup> disagreeing with the majority in a 5-4 decision about the standard of proof necessary to establish an antitrust violation by a union under Section 6 of the Norris LaGuardia Act.<sup>735</sup> He argued that the statute required “clear proof” rather than a preponderance of the evidence of the union’s complicity in the illegal scheme.<sup>736</sup> The union had allegedly joined with major coal producers to set wages and other conditions of employment at a level that would force smaller producers out of business.<sup>737</sup> Justice Douglas agreed that the allegations, if true, would subject the union to antitrust liability. He was wary of accurately differentiating, however, between the union’s best efforts to increase the wage scale industry-wide, which is what a union lawfully seeks to accomplish, and its conspiring with some employers to set wages at levels that would drive some producers from the market and thus benefit the conspiring producers.<sup>738</sup> To make that distinction, he argued, a clear proof standard was needed.<sup>739</sup>

Justice Douglas also disagreed with the majority in *Connell Construction Co. Inc. v. Plumbers & Steamfitters Local Union No. 100*,<sup>740</sup> arguing that the Court had construed the non-statutory exemption too narrowly, in contradistinction to his earlier dissents in *Jewel Tea* and *Pennington*. In *Connell* the Court ruled that a multi-employer collective bargaining agreement that required general contractor employers to contract only with subcontractors who also had agreements with the same union was not protected by the non-statutory exemption. Douglas joined Justice Stewart’s four-justice dissent<sup>741</sup> but also dissented separately.<sup>742</sup> Stewart

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<sup>732</sup>*Los Angeles Meat & Provision Drivers Union, Local 626 v. United States*, 371 U.S. 94 (1962).

<sup>733</sup>*Id.* at 108, 112 (Douglas, J., dissenting). The decision was 8-1.

<sup>734</sup>*Ramsey v. United Mine Workers*, 401 U.S. 302 (1971).

<sup>735</sup>*Id.* at 314 (Douglas, J., dissenting).

<sup>736</sup>*Id.* at 315-16.

<sup>737</sup>*Id.* at 304.

<sup>738</sup>*Id.* at 318-20.

<sup>739</sup>*Id.* at 319-20.

<sup>740</sup>*Connell Const. Co., Inc. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1974).

<sup>741</sup>*Id.* at 638 (Stewart, J., dissenting).

<sup>742</sup>*Id.* (Douglas, J., dissenting).

argued that Congress did not intend for secondary boycott activities like those engaged in by the union to be subject to the antitrust laws.<sup>743</sup> Douglas agreed, but noted the lack of a conspiracy allegation between the union and union subcontractors to force nonunion subcontractors from the market which was, for him, "the determinative feature of the case."<sup>744</sup>

Thus, at the labor-antitrust juncture, Justice Douglas was capable of asserting the antitrust laws and restricting the labor exemption if he was convinced that small competitors were being squeezed by unions in collaboration with large employers such as in *Jewel Tea* and, more particularly, *Pennington*. But he was concerned that labor unions not face antitrust liability too readily or too easily. From his pro-labor stance, grease peddlers should not be expelled from a questionable union affiliation because they divided markets and fixed prices. Clear proof and specific conspiracy allegations should be required for union liability under the antitrust laws.

Justice Douglas' antitrust philosophy, deeply rooted in populism, favored the small competitor. His labor philosophy favored the worker and his right to unionize and collectively bargain for higher wages and better working conditions. Small, independent businesses tend to pay lower wages and are not necessarily noted for their working environment. The collision of interests is inevitable and, given his strong beliefs and values, Justice Douglas' apparent inconsistency in drawing the line between antitrust and labor was perhaps predictable.

#### XVI. CONCLUSION

So at the end of the day (and in Justice Douglas' case it was the longest "day" ever on the Court) what kind of antitrust report card did the Justice earn? If one were to be most generous, one might label his antitrust record as mixed, given his stellar opinion in *Socony-Vacuum*. There he unequivocally recognized and made preeminent the importance of the price mechanism to a competitive market, a position from which he never wavered. One good, perhaps great opinion, however, cannot counterbalance the many stinkers he produced. If one attempts to be objective in light of both contemporary developments in antitrust law and the frequent confusion he generated in his own time, one must give Douglas a failing grade. Although Douglas, historically viewed, led the way in the expansion of the antitrust laws, the precedents he created have not, with the exception of price fixing, stood the test of time.

The intrinsic inconsistency of his antitrust philosophy is palpable. While *Socony-Vacuum* has been characterized as "[p]erhaps the best known and most ruthless evocation of the consumer,"<sup>745</sup> most of his opinions are patently anti-consumer. If nothing else, his opinions demonstrate that a coherent antitrust policy cannot protect both small business and the consumer. The former reduces the Sherman Act to the protection of the opportunity to compete, rather than the protection of competition itself. The incoherency of Justice Douglas' approach produces an antitrust law without form and with little substance.

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<sup>743</sup>*Id.* at 654-55.

<sup>744</sup>*Id.* at 638.

<sup>745</sup>PERITZ, *supra* note 47, at 173.



Justice Douglas must rate as the leading antitrust hawk in our history and, with his brethren on the Warren Court, is responsible for an unprecedented expansion of the antitrust laws. If Douglas had had his way, the expansion would have been even more dramatic. His fervor against big business and for the small businessman has not stood the test of time, however, at least not for a body of laws that seeks to enhance consumer welfare. There is irony in the fact that Douglas, who was so passionate about individual civil rights and liberties, actually harmed consumers in his populist attempt to protect small business.<sup>746</sup>

Indeed, it is unclear whether Justice Douglas recognized the inherent conflict between the protection of small business and consumer welfare. More likely, he did see it at some level but was simply resolute in his determination to frame the antitrust laws to protect the opportunity to compete, rather than as the watchdog of competition. The Warren Court and Douglas seemingly tipped their hand in the *Brown Shoe* decision when, despite their rhetoric, small business protectionism trumped consumer welfare.

Equally problematic is the poor quality of his opinions in his later years on the Court. Even in the areas of horizontal restraints where the law has changed less, Justice Douglas issued opinions containing generalized, non-specific language with the lack of any real factual analysis. They often read like they were written by someone in a rush to do something else. With that approach, he managed to muck up and create uncertainty in the law for years to come. In merger and monopolization cases, his opinions were simply result-oriented and the government did always win if he had anything to say about it. He and the Warren Court not infrequently posited legal principles or standards while then proceeding to misapply those principles to the facts before them.

One can argue that Justice Douglas' antitrust record is of a legal realist and functionalist run amuck. Legal realism posits that judges will be influenced by their own predilections and Douglas certainly was. The difficulty is that indeterminacy may result and precedent may be subverted if a judge goes too far. Douglas' abhorrence of market power and domination and concern for small business provided all too predictable results but no boundaries since he so often, even in the days of the Warren Court, argued to extend the reach of antitrust beyond his liberal brethren.

Justice Douglas' functionalism was supposed to be fact-dependent and lead to greater certainty and efficiency in the law. In a superficial sense, it did since under Douglas the government always won. But as Douglas' time on the Court wore on, his antitrust opinions became less fact dependent and more doctrinaire. Often his fact analysis was superficial and incomplete, the precise opposite of what his functionalism preached.

Another irony is that one can make a case that, in the antitrust arena, Justice Douglas, the product of humble circumstances who literally cleaned up Wall Street during the New Deal and who lived his life with a profound distrust of accumulations of economic wealth, came close to abusing his power on the Court in

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<sup>746</sup> Another contradiction stems from the fact that despite Justice Douglas' earned reputation as an expansive libertarian and populist who distrusted all exhibitions of power, he was by all accounts a tyrant to work for and commonly was abusive to his law clerks and secretaries. Most of his law clerks, for example, endured several "firings" and Justice Douglas typically took no interest in their personal lives or careers. See, e.g., MURPHY, *supra* note 10, at 407-15, 422-25; SIMON, *supra* note 9, at 224-27.

combating economic power. He did so by issuing opinions that were not fact driven but were instead fueled by ideology rather than economic and legal analysis. He further sought to protect and extend judicial control of competition policy by refusing to cede antitrust authority to other government entities and by expansively asserting Sherman Act subject matter jurisdiction.

While Justice Douglas' antitrust record is there for all to consider and critique, the more difficult and ultimately more speculative questions center around the underlying reasons for his flawed legacy. Initially, it is difficult to argue that the lack of sophistication in his later antitrust opinions emanated from a mediocre mind. Douglas was perhaps not as brilliant as he made himself out to be, but certainly he had a first-rate legal mind. He was also a prodigious writer<sup>747</sup> and, as an academic early in his career, a "star" by any measure.<sup>748</sup> He was a man in a hurry with many interests and passions, and one cannot help but wonder when reading some of his poorer opinions where his mind really was that day.

One should also consider that Justice Douglas, even with his irascible personality, had considerable political ability and even greater political ambition. Within the confines of the Court, he certainly had influence and no doubt knew how and when to exercise it to get votes on issues important to him. It may be that compromise sometimes "made a camel out of a horse" but he was in fact an influential voice during his four decades on the Court.

His distrust of concentrations of economic power that so fueled his antitrust philosophy most likely had its roots in his impoverished childhood and college years. His academic work with financial institutions and his path-breaking role in reforming the SEC in the 1930s, where he was privy to greed and manipulation by corporate insiders, must have solidified his distrust of big business. Certainly he was influenced by Justice Brandeis, who he acknowledged "helped crystallize my views" of "the free enterprise system," as well as the economist Veblen. They gave voice to his own experience dealing with the SEC. Thurman Arnold, his colleague and close friend at Yale, must have been influential as well. Both appeared to leave the New Deal's ambivalence about the value of competition, as opposed to government regulation, in their wake.

Certainly Justice Douglas' populism caused him to focus on the small business owner as antitrust's principal beneficiary. In fairness, the disconnect between consumer welfare and small business protectionism was not as well understood during Douglas' years on the Court, although cases like *Brown Shoe* showed that the Court could simultaneously utter totally inconsistent policies. Nor had the pro-competitive utility of efficiencies or the primacy of interbrand over intrabrand competition yet been given their due. Wealth maximization as an antitrust goal was, for the most part, not in the lexicon. Further, the uneven antitrust terrain Douglas inherited contained the property concept of restraints against alienation as an

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<sup>747</sup>Douglas wrote, excluding casebooks, thirty-six books or monographs during his life, including his two-volume autobiography. Many were on outdoor or travel topics not related to law.

<sup>748</sup>In his short full-time academic career at Columbia and Yale, Douglas produced nine law review articles, mostly co-authored and many based on empirical research, and seven co-authored casebooks, prodigious scholarly production by any contemporary or historical measure.

antitrust goal and precedent like *Appalachian Coals*. But the fact remains that Douglas and his Warren Court brethren did not advance the antitrust ball in any coherent or lasting manner.

Ultimately perhaps the most telling observation of Justice Douglas' antitrust legacy is that the *Socony-Vacuum* decision, the first antitrust opinion of the longest sitting Supreme Court justice in our history (and the Justice who authored more antitrust opinions than anyone on the high Court), is the only lasting antitrust precedent flowing from Douglas' pen. Unfortunately, it was all downhill after that.

